SUPREME COURT OF THE UNITED STATES.

No. 69.

CHARTES SCOTT, BAILIFF OF WM. S. MOORE, PLAINTIFF IN ERROR,

VERSUS

JOHN LLOYD, DEFENDANT IN ERROR.

WASHINGTON CIRCUIT COURT UNITED STATES.

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Writ of Error.

United States of America, ss.

The President of the United States, to the Judges of the circuit court of the United States for the District of Columbia, sitting for the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between John Lloyd, plaintiff, and Charles Scott, bailiff of William S. Moore, defendant—a manifest error hath happened, to the great damage of the said Charles Scott, bailiff of William S. Moore, as by his complaint appears, we being willing that error, if any hath been, do command you if judgment be therein given, that under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in said Supreme Court to be then and there held, and that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Judge of said Supreme Court of the United States.

Issued this 10th day of December, 1836.

[seal.] W. BRENT, Clerk
Circuit Court District of Columbia, City of Washington.

Citation.

United States of America,
District of Columbia, Washington county, sct.

To John Lloyd, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of January next, pursuant to a writ of error filed in clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein Charles Scott, bailiff of William S. Moore, is plaintiff in error, and you are defendant in error, to show cause if any there be, why judgment rendered against the said Charles Scott, bailiff of William S. Moore, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable William Cranch, chief judge of the circuit court of the District of Columbia, this 10th day of December, 1836.

W. CRANCH.

Copy Appeal Bond.

Know all men by these presents, that we, John McKim, Jun. of Baltimore, and Robert J. Taylor, of Alexandria county, administrator of W. S. Moore, deceased, are held and firmly bound into John Lloyd in the full and just sum of two hundred dollars current money, to be paid to the said

John Lloyd, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves and each of us, and *and* each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated this tenth day of December, in the year of our Lord one thousand eight hundred and thirty six.

Whereas lately at a circuit court of the United States for the District of Columbia, sitting for the county of Washington, in a suit depending in the said circuit court, wherein the said John Lloyd was plaintiff, and Charles Scott, bailiff of William S. Moore, was defendant; judgment was rendered against the said defendant; and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation to the said John Lloyd directed, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of January next:

Now the condition of the above obligation is such, that if the said Charles Scott, bailiff of Wm. S. Moore, shall prosecute said suit to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue in law.

JOHN McKIM, Jr. [SEAL.]
R. J. TAYLOR. [SEAL.]

Signed, sealed, and delivered in the presence of
HOWARD GRIFFITH, Jr.
WM. H. MARRIOTT.

Approved W. CRANCH.

Style of Court.

DISTRICT OF COLUMBIA, to wit.

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty eighth day of the same month, in the year of our Lord one thousand eight hundred and thirty-six, and of the independence of the United States the sixtieth:

Were present the Hon. WILLIAM CRANCH, Chief Judge.
BUCKNER THRUSTON & } Assistant Judges.
JAMES S. MORSELL, }
ALEXANDER HUNTER, Esq., Marshal.
WILLIAM BRENT, Clerk.

In the record of proceedings of the same court, among others are the following, to wit:

Parties.

JOHN LLOYD
vs.
CHARLES SCOTT, Bailiff of WILLIAM S. MOORE.

Mandate from the Supreme Court filed.

Be it remembered, that heretofore, to wit, on the twentieth day of April in the year of our Lord one thousand eight hundred and thirty-five, the said John Lloyd, by Thomas Swann and Francis S. Key, Esquires, his attorneys, filed in the circuit court here a mandate from the Supreme Court of the United States, in the words, and of the tenor following, to wit:

Mandate.

UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the District of Columbia, holden in and for the county of Washington, greeting:

Whereas, lately, in the circuit court of the United States for the District of Columbia, before you, or some of you, in a cause between John Lloyd, plaintiff, and Charles Scott, bailiff of William S. Moore, defendant, the judgment of the said court was in the following words, viz:

"Therefore it is considered by the court here, that the said John Lloyd have the goods and chattels in the said declaration mentioned, to be held by him irrepleviable forever; and it is also considered by the court here, that the said John Lloyd recover against the said Charles Scott, bailiff of William S. Moore, as well the sum of one cent current money, his damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, as also the sum of two hundred and fifty-one dollars and fifteen cents, ($251 15) by the court here, unto him on his assent adjudged for his costs and charges by him about his suit in this behalf laid out and expended; and the said Charles in mercy, &c.," as by the inspection of the transcript of the record of said circuit court, which was brought into the Supreme Court of the United States, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and thirty-five, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby reversed and annulled, and that this cause be and the same is hereby remanded to the said circuit court with directions to set aside the verdict and award a venire facias de novo. March 5.

You therefore are hereby commanded, that such further proceedings be had in said cause, in conformity to the opinion and judgment of this court, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the honorable John Marshall, chief justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-five.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Appearance of parties, and papers in original cause filed.

And in pursuance of the said mandate, came into the circuit court here, as well the said John Lloyd by his attorneys aforesaid, as the said Charles

Scott, bailiff of William S. Moore, by Richard S. Coxe and Walter Jones, Esquires, his attorneys, and thereupon the papers and proceedings in *in* the original suit referred to in the said mandate were brought forward and filed in this cause, and are as follows:

Papers and proceedings in the original cause.

District of Columbia, sct.

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of November, being the twenty-sixth day of the same month, in the year of our Lord one thousand eight hundred and thirty-two, and of the independence of the United States of America the fifty-seventh:

Were present the Hon. WILLIAM CRANCH, Chief Judge.
BUCKNER THRUSTON & } Assistant Judges.
JAMES S. MORSEL }
HENRY ASHTON, Esq., Marshal.
WILLIAM BRENT, Clerk.

In the record of proceedings of the same court, among others, are the following, to wit:

Parties.

John Lloyd
vs.
Charles Scott, Bailiff of William S. Moore.

Appearance of parties, and record from Alexandria county filed.

Be it remembered, that heretofore, to wit, at the December term of this court, in the year of our Lord one thousand eight hundred and thirty, the said John Lloyd, by Thomas Swann, Esquire, his attorney, and Charles Scott, bailiff of William S. Moore, by Walter Jones, Esquire, his attorney, filed in the court here the record of proceedings had in this cause in the county of Alexandria, in the words and figures following, to wit:

Record from Alexandria county.

District of Columbia, to wit:

John Lloyd
vs. } In Replevin.
Charles Scott, Bailiff of William S. Moore.

Be it remembered, that on the 18th day of March, 1835, came the aforesaid John Lloyd, and sued out of the office of the clerk of the United States' circuit court, of the District of Columbia, for the county of Alexandria, a certain writ of replevin against the said Charles Scott, "bailiff of William S. Moore," which said writ is in the words and figures following:

Writ of Replevin.

District of Columbia, to wit:

The United States of America, to the Marshal of the District of Columbia, greeting:

If John Lloyd shall make you secure, you are hereby commanded that, justly, and without delay, you cause to be replevied to him, three dining tables, eighteen mahogany chairs, twelve windsor chairs, two couches, one bedstead, four beds and mattrass, one negro woman named Sylvia, her child Jane, and a negro man named William; which Charles Scott, bailiff of William S. Moore lately took, and unjustly detained against gages and pledges, as it is said, and after him justly to be deduced that no clamor we may hear for defect of justice, and that you summon the said Charles Scott, to appear before the honorable the judges of the United States' circuit court of the District of Columbia for the county of Alexandria, at the court-house in the town of Alexandria, at the next court, to answer the wrongful taking the said property. Damages one thousand dollars; and have then and there this writ.

Witness William Cranch, Esquire, chief judge of our said court, this 18th day of March, in the year of our Lord 1825.

EDM. I. LEE, Clerk.

Marshal's Return.

Executed 19th March, 1835, on Charles Scott, bailiff of William S. Moore, and the property within named delivered over to John Lloyd.

D. MINOR, deputy for
T. RINGGOLD, Marshal.

Replevin Bond.

Know all men by these presents, that we, John Lloyd and Edmund I. Lee, are held and firmly bound unto Tench Ringgold, Marshal of the District of Columbia, in the full and just sum of one thousand dollars, to the payment of which, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this eighteenth day of March, 1825.

The condition of the above obligation is such, that whereas the above bound John Lloyd hath this day sued out of the clerk's office of the circuit court of the District of Columbia, for the county of Alexandria, the United States writ of replevin, thereby commanding the Marshal of the said district to replevy to him, three dining tables, eighteen mahogany chairs, twelve windsor chairs, two couches, one bedstead, four beds and mattrass, one negro woman named Sylvia, her child Jane, and one negro man named William, which "Charles Scott, bailiff of William S. Moore," lately took and detained in the said county, for rent supposed to be due to the said William S. Moore:

Now, if the said John Lloyd, his heirs, executors, and administrators, do, and shall well and truly perform and satisfy the judgment of the circuit court of the District of Columbia, for the county of Alexandria, in the said suit of replevin, in case the above bound John Lloyd shall be cast on the trial of the same, then the above obligation to be void, or else to remain in full force, power and virtue.

JOHN LLOYD, [SEAL.]
EDM. I. LEE, [SEAL.]

Sealed and delivered in the presence of
M. BAYLY, jr.

Cause continued May and June 1825.

And at the rules held in the clerk's office for the months of May and June in the same year, this cause was continued.

Rule Nar. and continuance, July 1825.

At another day, to wit, at the rules held in the clerk's office of the said court for the month of July, came the defendant aforesaid, by Robert J. Taylor, Esq., his attorney, and a day is thereupon given the plaintiff, until the next rules to file his declaration, and the same day is given the defendant, there, &c., and cause continued.

August rules 1825 continued.

September rules 1825.

At the rules held for the month of September, came the plaintiff, by Thomas Swann, Esquire, his attorney, and filed there his declaration against the said defendant; which declaration is in the words following, to wit:

Nar.

COUNTY OF ALEXANDRIA, to wit:

John Lloyd complains of Charles Scott, in custody, &c. of a plea, for that the said Charles, on the day of in the year of our Lord one thousand eight hundred and twenty-four, at the county aforesaid, took the goods and chattels following, of the said plaintiff, to wit, three dining tables, eighteen mahogany chairs, twelve windsor chairs, two couches, one bedstead, four beds and mattrass, one negro woman named Sylvia, her child Jane, and one negro man named William, and detained them against gages and pledges, until, &c.; whereby the said John saith he is injured and hath sustained damages to the value of one thousand dollars; therefore he brings suit, &c.

SWANN, for Plaintiff.

J. DOE, } Pledges, &c.
R. ROE, }

Judgment by default nisi.

And the defendant having been arrested and failing to appear, on the motion of the plaintiff, by his attorney, it is ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff hath sustained by occasion of the trespass in the declaration mentioned, unless the defendant shall appear and plead to issue at the next rules.

Judgment by default confirmed.

And at the rules held in the clerk's office of the said court, for the month of October, in the same year, the defendant still failing to appear, on motion of the plaintiff, by his attorney, it is ordered, that the last order made against him in this cause, be confirmed, and that the plaintiff's damages be assessed by a jury at the next term.

1827, November. Defendant appears and files avowry. Plaintiff's special Demurrer, Joinder, and four Pleas. Defendant's avowry.

And at a court continued and held for the District and county aforesaid, the 30th day of November, 1827, (until which time this cause had been regularly continued,) came the defendant by his attorney, and filed his avowry; and, thereupon, the plaintiff filed a special demurrer to the said avowry, and the defendant joins in the said demurrer and four pleas filed; all which are as follows:

Charles Cox, bailiff, &c., at suit John Lloyd.

And the said Charles Scott, by Robert J. Taylor his attorney, comes and defends the force and injury, when, &c.; and as bailiff of William S. Moore, will acknowledge the taking of the said goods and chattels, in the said plea, when, &c., and justly, &c., because, he says, that before the said time, when the said, the taking of the said goods and chattels, is supposed to have been made, one Jonathan Scholfield was seized in his demesne in fee of four brick tenements, and a lot of ground whereon they stood, on the east side of Washington street, and north side of Duke street, in the town of Alexandria, and county aforesaid, whereof the said place, when, &c. is, and at the said time, when, &c. was parcel, and being so seized as aforesaid, of the said tenements and lot of ground, he, the said Jonathan and Eleanor his wife, afterwards, and before the said time, when, &c. to wit, on the eleventh day of June, 1814, at the county aforesaid, by their certain indenture dated the said 11th day of June, 1814, and here now to the court shown, in consideration of the sum of five thousand dollars, by the said William paid to the said Jonathan, granted, bargained, and sold to the said William, one certain annuity or yearly rent of five hundred dollars, to be enuring out of, and charged upon, the said four brick tenements and lot of ground, whereof the said place, when, &c. is parcel, to be paid to the said William, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars each, on the 10th day of December, and on the 10th day of June, in every year for ever thereafter. To hold the said annuity or rent, so as aforesaid charged and payable, to the said William S. Moore, his heirs and assigns, to his and their only proper use for ever; and the said Jonathan Scholfield, for himself, his heirs and assigns, did by the said indenture, among other things, covenant with the said William S. Moore, his heirs and assigns, that he the said Jonathan Scholfield, his heirs and assigns, would well and truly satisfy and pay to the said William S. Moore, his heirs and assigns, the said annual rent of five hundred dollars, by equal half-yearly payments as aforesaid for ever, and that if the said rent should not be punctually paid as it became due, then that on every such default, it should be lawful for the said William S. Moore, his heirs and assigns, from time to time, to enter on the said four tenements and lot of ground, so as aforesaid charged, of which the said place, when, &c. is parcel, and to levy by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale, of which said rent, so as aforesaid granted, the said William became and was seized under the said deed, and by the perception thereof, that is to say, on the eleventh day of December, in the year 1814, at the county aforesaid, and has since remained, and yet is seized thereof.

And afterwards, that is to say, on the 29th day of October, in the year 1816, at the county aforesaid, the said Jonathan Scholfield and Eleanor his wife, by their certain deed of bargain and sale, under their seals, dated on the day and year last mentioned, bargained, sold, and conveyed to the said John Lloyd, his heirs and assigns for ever, certain tenements and lots of ground in the said town of Alexandria, whereof the said four brick tenements and lot of ground before mentioned, including the said place, where, &c. is and was parcel subject by the terms of the said deed to the payment of the said annuity or rent of five hundred dollars to the said William S. Moore, his heirs and assigns, under and in virtue of which said bargain, sale, and conveyance to him, the said John entered upon the said tenements and lots of ground so to him bargained, sold, and conveyed, of which the said place were, &c. is, and was parcel, and became thereof seized and possessed, that is to say, on the said 29th day of October, in the year 1816, at the county aforesaid, and ever since has continued, and yet is so seized and possessed; and became, after the said bargain, sale, and conveyance to the said plaintiff as aforesaid, and after his entry, seizin, and possession of the premises, including the said place, were, &c. And whilst he so continued seized and possessed as aforesaid, the sum of two hundred and fifty dollars of the annuity or rent aforesaid, for the half year ending on the 10th day of June, in the year 1824; and the further sum of two hundred and fifty dollars of the said annuity or rent, for the half year ending on the 10th day of December, in the year 1824, became and remained in arrear and unpaid to the said William S. Moore, he, the said Charles Scott, as bailiff of the said William, and by his command and authority at the said time, where, &c. entered on the said place, where, &c. being parcel of the said four brick tenements and lot of ground so as aforesaid charged with the said annuity or rent, and liable to the distress of the said William, and took and carried away the said goods and chattels in the declaration mentioned, then and there being found in the said place, where, &c. parcel of the said four tenements and lot of ground as a distress for the said rent so in arrear as aforesaid to the said William, as he lawfully might; and this he is ready to verify, &c. Wherefore, the said Charles prays judgment for the sum of one thousand dollars, being double the value of the said rent so in arrear and distrained for as aforesaid, with full costs of suit, &c. according to the statute in that case provided.

R. J. TAYLOR, for Defendant.

(Special Demurrer and Joinder not on file.)

1st Plea.

And the said John, by Thomas Swann, his attorney, prays oyer of the said indenture from the said Jonathan Scholfield and Eleanor his wife, to the said William S. Moore, in the said cognizance mentioned. And the same is read to him in these words, to wit: (copied in page 27,) which being read and heard, the said John saith, that the said Charles, as bailiff of the said William S. Moore, for the reasons before alleged, ought not justly to acknowledge the taking of the goods and chattels aforesaid, in the said place, in which, &c. because he saith, that before the making of the said indenture, that is to say, on the eleventh day of June, in the year 1814, at the county aforesaid, it was corruptly agreed between the said Jonathan Scholfield and the said William S. Moore, that the said William S. Moore should advance to him, the said Jonathan, the sum of five thousand dollars; and in consideration thereof that he, the said Jonathan and the said Eleanor his wife, should grant, by a deed of indenture, duly executed and delivered to him, the said William, his heirs and assigns, forever, a certain annuity or rent of five hundred dollars to be issuing out of, and charged upon a lot of ground and four brick tenements, and appurtenances thereon erected, on the east side of Washington street, and on the north side of Duke street, in the town of Alexandria, bounded as follows: beginning at the intersection of said streets; thence north on Washington street eighty-seven feet, more or less, to the partition wall between the fourth and fifth tenements from Duke street; thence, east parallel to Duke street, and with said partition wall one hundred and twelve feet to an alley; thence, with the line of the said alley eighty-seven feet to Duke street; thence, on Duke street west to the beginning, to be paid to the said William, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars, on the tenth day of December, and on the tenth day of June for ever thereafter. And it was further corruptly agreed, that he the said Jonathan, in and by the said deed of indenture, should, for himself, his heirs, executors, administrators, and assigns, covenant with the said William, his heirs and assigns, that he would well and truly pay to him, the said William, his heirs and assigns, the said annuity or rent of five hundred dollars by equal half-yearly payments, on the tenth day of June, and tenth day of December in each year for ever thereafter, as the same should become due; and that if the same should not be punctually paid, that then it should be lawful for the said William, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale; and if the same should remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same could be found on the premises, that then it should be lawful for the said William, his heirs and assigns, to enter upon the premises charged, and from thence to remove and expel the said Jonathan, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate for ever thereafter. And it was further corruptly agreed between the said Jonathan and him the said William, that he the said Jonathan should enter into these further covenants in the said indenture, that is to say, a covenant, that he the said Jonathan at the time of the execution of the said indenture, was then in his own right, seized in fee simple in the premises charged free from any condition or encumbrance other than such as were specified in a deed from the said Jonathan to Robert J. Taylor, dated the day of , and that he the said Jonathan, his heirs and assigns, would for ever thereafter keep the buildings which then were or thereafter might be erected on the premises charged fully insured against fire in some incorporated insurance office, and would assign the policies of insurance to such trustee as the said William, his heirs and assigns, might appoint, to the intent that if any damage or destruction from fire should happen, that the money received on such policies might be applied to rebuilding or repairing the buildings destroyed or damaged. And that he the said Jonathan, his heirs and assigns, would execute and deliver any further conveyance which might be necessary more completely to charge the premises before mentioned with the annuity aforesaid, and to carry into full effect the intention of the said parties. And lastly, that he and his heirs would for ever warrant and defend the annuity or rent so agreed to be granted to the said William, his heirs and assigns, against any defalcation and deductions for or on account of any act of him, his heirs or assigns. And the said William did further corruptly agree, that he would in the said indenture covenant for himself, his heirs and assigns, with the said Jonathan, his heirs and assigns, that if the said Jonathan, his heirs or assigns, should at any time thereafter, at the expiration of five years from the date of the said indenture, pay to the said William, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent and ratable dividend of the rent for the time which should have elapsed between the half year's day then next preceding, and the day on which such payment should be made, he the said William, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing the rent or annuity thereby agreed to be created, which, on such payments being made, should for ever after cease to be payable. And the said John saith, that afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, the said William, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Jonathan the said sum of five thousand dollars. And the said Jonathan and Eleanor his wife, and the said William, did then and there make, seal, and duly deliver to each other, respectively, the said deed of indenture, as their several acts and deeds, which said deed was duly acknowledged by the said Eleanor, and admitted to record. And so the said John saith, that the said deed of indenture in the said cognizance mentioned, was made in consideration of money advanced upon and for usury; and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the said sum of five thousand dollars so advanced as aforesaid, for the term of one year; and that the said John is ready to verify; whereupon he prays judgment, if he ought to be charged with the rent aforesaid, by virtue of the indenture aforesaid; and for as much as the said Charles hath acknowledged the taking of the said goods and chattels, he the said John prays judgment and his damages, on occasion of the taking and unjust detaining of the said goods and chattels to be adjudged to him, &c.

2d Plea.

LLOYD
vs.
SCOTT, bailiff, &c. }

And the said John, by Thomas Swann, his attorney, prays oyer of the deed of indenture from the said Jonathan Scholfield and Eleanor his wife to the said William S. Moore, in the cognizance mentioned. And the same is read to him in these words, to wit: (Copied in page 27,) which being read and heard, the said John, for further plea saith, that the said Charles, as bailiff of the said William S. Moore, for the reasons before alleged, ought not justly to acknowledge the taking of the goods and chattels aforesaid, in the said place in which, &c. because, he said, before the making of the said indenture, that is to say, on the eleventh day of June, in the year 1814, at the county aforesaid, it was corruptly agreed between the said Jonathan Scholfield and the said William S. Moore, that he, the said William S. Moore should lend to him the said Jonathan, the sum of five thousand dollars. And in consideration thereof, that he the said Jonathan, and the said Eleanor his wife, by a deed of indenture duly executed and delivered, should grant to him, the said William, his heirs and assigns for ever, a certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements and appurtenances thereon erected, on the east side of Washington street, and on the north side of Duke street, in the town of Alexandria, bounded as follows: beginning at the intersection of said streets; thence, north on Washington street eighty-seven feet, more or less, to the partition wall between the fourth and fifth tenements from Duke street; thence, east parallel to Duke street, and with said partition well one hundred and twelve feet to an alley; thence, with the line of the said alley eighty-seven feet to Duke street; thence, on Duke street to the beginning, to be paid to the said William S. Moore, his heirs and assigns, by equal half yearly payments of two hundred and fifty dollars, on the tenth day of December, and the tenth day of June for ever thereafter. And it was further corruptly agreed, that he the said Jonathan, in and by the said deed of indenture should for himself, his heirs, executors, administrators and assigns, covenant with the said William, his heirs and assigns, that he would well and truly pay to him the said William, his heirs and assigns, the said annuity or rent of five hundred dollars by equal half yearly payments on the tenth day of June, and tenth day of December, in each year forever thereafter, as the same should become due; and that if the same should not be punctually paid, that then it should be lawful for the said William, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy by distress and sale of the goods and chattels there found, the rent in arrear and the costs of distress and sale; and if the same should remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same could be found on the premises, that then it should be lawful for the said William, his heirs and assigns, to enter upon the premises charged, and from thence to remove and expel the said Jonathan, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate forever thereafter. And it was further corruptly agreed between the said Jonathan and him the said William, that he the said Jonathan should enter into those further covenants in the said indenture, that is to say, a covenant that he the said Jonathan, at the time of the execution of the said indenture, was there in his own right seized in fee simple in the premises charged free from any condition or incumbrances other than such as were specified in a deed from the said Jonathan to Robert J. Taylor, dated the tenth day of June, 1814; and that he the said Jonathan, his heirs and assigns, would forever thereafter keep the buildings which then were, or thereafter might be, erected on the premises charged, fully insured against fire in some incorporated insurance office, and would assign the policies of insurance to such trustee as the said William, his heirs or assigns, might appoint, to the intent that if any damage or destruction from fire should happen, that the money received on such policies might be applied to rebuilding or repairing the buildings destroyed or damaged; and that he the said Jonathan, his heirs and assigns, would execute and deliver any further conveyance which might be necessary more completely to charge the premises beforementioned with the annuity aforesaid, and to carry into full effect the intention of the said parties; and lastly, that he and his heirs would forever warrant and defend the annuity or rent so agreed to be granted to

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the said William, his heirs and assigns, against any defalcations and deductions for or on account of any act of him, his heirs or assigns. And the said William did further corruptly agree that he would, in the said indenture, covenant for himself, his heirs and assigns, with the said Jonathan, his heirs and assigns, that if the said Jonathan, his heirs or assigns, should at any time thereafter at the expiration of five years from the date of the said indenture, pay to the said William, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent and ratable dividends of the rent for the time which should have elapsed between the half year's day then next preceding, and the day on which such payment should be made, he the said William, his heirs and assigns, would execute and deliver any deed or instruments which might be necessary for releasing and extinguishing the rent or annuity thereby agreed to be created, which, on such payments being made, should forever after cease to be payable.

And the said John saith that afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, the said William in pursuance and in prosecution of the said corrupt agreement, did advance to the said Jonathan the said sum of five thousand dollars; and the said Jonathan, and Eleanor his wife, and the said William did then and there make, seal, and duly deliver to each other respectively the said deed of indenture, as their several acts and deeds, which said deed was duly acknowledged by the said Eleanor, and admitted to record. And so the said John saith, that the said deed of indenture in the said cognizance mentioned was made in consideration of money lent upon and for usury; and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of five thousand dollars, so lent as aforesaid for the term of one year, and this the said John is ready to verify; therefore he prays judgment, if he ought to be charged with the rent aforesaid, by virtue of the indenture aforesaid; and inasmuch as the said Charles hath acknowledged the taking of the said goods and chattles, he, the said John prays judgment and his damages on occasion of the taking and unjust detaining of the said goods and chattles to be adjudged to him, &c.

3d Plea.

And the said John, by Thomas Swann his attorney, prays oyer of the deed of indenture from the said Jonathan Scholfield and Eleanor, his wife, to the said William S. Moore in the said cognizance mentioned; and the same is read to him in these words, to wit, (copid in page 27); which being read and heard, the said John, for further plea saith, that the said Charles, as bailiff of the said William, for the reasons before alleged, ought not justly to acknowledge the taking of the said goods and chattels aforesaid in the said place in which, &c.; because he saith that before the making of the said indenture, that is to say, on the eleventh day of June, in the year 1814, at the county of Alexandria aforesaid, it was corruptly agreed between the said Jonathan and the said William, that he the said William should advance to him the said Jonathan the sum of five thousand dollars upon the terms and conditions and in consideration of the covenants and agreements in the said indenture mentioned and contained; and that in pursuance of the said corrupt agreement, and in the prosecution and fulfilment of the same, the said William did then and there advance to him the said Jonathan the said sum of five thousand dollars. And the said Jonathan and Eleanor, his wife, and the said William did then and there make, and seal, and duly deliver the said deed of indenture to each party respectively as their act and deed. And so the said John saith, that the said deed of indenture was made in consideration of money advanced upon and for usury; and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of five thousand dollars, so advanced as aforesaid for the term of one year, and this the said John is ready to verify; wherefore he prays judgment, if he ought to be charged with the rent aforesaid, by virtue of the indenture aforesaid. And inasmuch as the said Charles hath acknowledged the taking of the said goods and chattels, he, the said John prays judgment and his damages on account of the taking and unjust detaining of the said goods and chattels to be adjudged to him, &c.

4th Plea.

And the said John, by Thomas Swann his attorney, prays oyer of the deed of indenture from Jonathan Scholfield and Eleanor, his wife, to the said William S. Moore in the said cognizance mentioned, and the same is read to him in these words, to wit, (copied in page 27) which being read and heard, the said John for further plea saith, that the said Charles, as bailiff of the said William, for the reasons before alleged, ought not justly to acknowledge the taking of the said goods and chattels in the said place in which, &c.; because he saith that before the making of the said indenture, that is to say, on the eleventh day of June, one thousand eight hundred and fourteen, at the county of Alexandria aforesaid, it was corruptly agreed between the said Jonathan and the said William, that he, the said William, should lend to him, the said Jonathan, the sum of five thousand dollars upon the terms and conditions and in consideration of the covenants and agreements in the said indenture mentioned and contained; and that in pursuance of the said corrupt agreement, and in prosecution and fulfilment of the same, the said William did then and there lend to the said Jonathan the said sum of five thousand dollars; and the said Jonathan and Eleanor, his wife, and the said William did then and there make, and seal, and duly deliver the said deed of indenture to each party respectively as their act and deed; and so the said John saith that the said deed of indenture was made in consideration of money lent upon and for usury; and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of five thousand dollars, so lent as aforesaid, for the term of one year, and this the said John is hereby to verify; wherefore he prays judgment if he ought to be charged with the rent aforesaid, by virtue of the indenture aforesaid; and inasmuch as the said Charles hath acknowledged the taking of the said goods and chattels, he, the said John, prays judgment and his damages on occasion of the taking and detaining of the said goods and chattels to be adjudged to him, &c.

April Term, 1828. Rule on Defendant to reply to Pleas.

And at another day, to wit, at a court held for the district and county aforesaid, the 14th day of April, 1828, on the motion of the plaintiff by his attorney, it is ordered that the avowant do, on and before Monday, the 21st day of this month, reply to the pleas filed by the said John Lloyd, in this case, at the last term.

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Judgment for Defendant on avowry.

At another day, to wit, at a court continued and held for the district and county aforesaid, the 16th day of April, 1828, came the parties by their attorneys, and thereupon the plaintiff's demurrer to the defendant's avowry being argued, it seems to the court that the matters in the said avowry contained are sufficient in law to bar the plaintiff from having his action against the defendant.

November, 1828. Demurrer to Pleas.

And at another day, to wit, at a court continued and held for the district and county aforesaid, the 15th day of November, 1828, the defendant filed a special demurrer to each of the pleas filed by the plaintiff. And the plaintiff joins in the said demurrer.

(Demurrer not on file.)

Judgment for Defendant on demurrer to Pleas.

And at a court continued and held for the district and county aforesaid, the 25th day of November, 1828, came the parties by their attorneys, and thereupon the matters of law arising upon the defendant's demurrer to plaintiff's pleas being argued, it seems to the court that the said pleas and the matter therein contained are not sufficient in law to bar the defendant from acknowledging the taking of the said goods and chattels in the said place, where, &c. as bailiff of the said William S. Moore. And it appearing to the court, on the trial of this suit, that the rent distrained for is justly due to the said William S. Moore, it is therefore considered that the said John Lloyd take nothing by his suit aforesaid; but for his false clamors therein be in mercy, &c. And that the said Charles Scott, for the use of the said William S. Moore, and as his bailiff, go thereof without day, and recover from the plaintiff the sum of one thousand dollars, being double the value of the rent distrained for, with full costs of suit, &c.

Plaintiff's costs,	$21 00.
Defendant's costs,	10 75.

April Term, 1830. Mandate from Supreme Court filed. Demurrer to 2d and 4th Pleas overruled. Leave to withdraw and reply de novo.

At another day, to wit, at a court continued and held for the district and county aforesaid, the 20th day of April, 1830, a mandate from the Supreme Court was presented and received by the court, and ordered to be filed; and in pursuance of the order of the Supreme Court in the said mandate contained, the court doth now overrule the demurrer of the defendant to the second and fourth pleas by the plaintiff pleaded to the said defendant's cognizance; and on the said defendant's motion, leave is given him to withdraw the said demurrers and reply de novo to the said second and fourth pleas. And time is given the defendant to file such replications until the first day of August next.

(Mandate copied in page 22.)

November Term, 1830. Demurrer withdrawn and general Replication, and Issue, and Cause removed to Washington county.

At a court continued and held for the said district and county, November

27th, 1830, the general demurrer withdrawn, and general replication to second and fourth pleas and issue And on the application of the defendant, this cause is removed to Washington county; and it is ordered, that the clerk do transmit a transcript of the record of proceedings, together with the original papers, to the clerk of the circuit court for the county of Washington.

Commissions awarded to either party to take Depositions.

And at a court continued and held for said district and county, the 29th day of November, 1830, by consent of parties commissions are awarded to either party to take the depositions of the witnesses of either party, upon giving five days' notice of the time and place of taking the same.

A copy.

Test, EDM. I. LEE, Clk.

Venire ordered by consent.

Thereupon it was ordered by the court here, with the consent of the said parties, by their attorneys aforesaid, that a jury thereon appear before the court here, on the first Monday of May next, by whom, &c., and who neither, &c. to recognize, &c., because as well, &c. And the same day is given to the said parties then and there, &c.

May Term, 1831. Appearance of Parties.

And now, to wit, the said first Monday of May, in the year of our Lord one thousand eight hundred and thirty-one, comes again into the circuit court here, as well the said John Lloyd, by his attorney aforesaid, as the said Charles Scott, bailiff of William S. Moore, by his attorney aforesaid.

Order to empannel Jury.

Whereupon for trying the issues aforesaid, it is ordered by the court here, that twenty persons from the pannel of petit jurors returned to the court here by the marshal, be drawn by ballot, according to the law in such cases made and provided; thereupon the twenty persons being so drawn and written on two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, the remaining twelve persons being called, come, to wit:

Jurors' names.

1. Thomas Hyde,
2. Lewis Smith,
3. Clement McWilliams,
4. Paul Stevens,
5. Thomas Tenwick,
6. Joseph Cooper,
7. Samuel P. Lowe,
8. Thomas Marshall,
9. David Butler,
10. Henry McPherson,
11. Judson Mitchell,
12. Richard Harrison.

Jury empannelled and sworn. Juror withdrawn.

Who, being empannelled and sworn to say the truth in the premises, whereupon for certain reasons as well to the court here as to the parties aforesaid appearing, the said Thomas Hyde, one of the jurors of the jury abovementioned from the pannel aforesaid, is withdrawn by consent of the said parties; and by order of the court here and the rest of the jurors of that jury are wholly discharged from given any verdict of and upon the premises aforesaid.

Cause continued.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, with the consent of said parties by their attorneys aforesaid, and by order of the court here is continued until the first Monday of December next.

December Term, 1831. Appearance of Parties.

And now, to wit, the said first Monday of December, in the year of our Lord one thousand eight hundred and thirty-one, comes again into the circuit court here, as well the said John Lloyd by his attorney aforesaid, as the said Charles Scott, bailiff of William S. Moore, by his attorney aforesaid.

Cause continued.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid with the consent of said parties by their attorneys aforesaid, and by order of the court here, is continued until the first Monday of May next.

May Term, 1832. Appearance of Parties.

And now, to wit, the said first Monday of May, in the year of our Lord one thousand eight hundred and thirty-two, comes again into the circuit court here as well the said John Lloyd by his said attorney, as the said Charles Scott, bailiff of William S. Moore, by his said attorney.

Order to empannel Jury.

Whereupon for trying the issues aforesaid, it is ordered by the court here that twenty persons, from the pannel of petit jurors returned to the court here by the marshal, be drawn by ballot, according to the law in such cases made and provided; thereupon the twenty persons being so drawn and written on two lists, one of which said lists was delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from said lists, the remaining twelve persons being called, come, to wit:

Jurors' names.

1. Henry Holmead,
2. William Lowry,
3. William Magee,
4. Robert H. Clements,
5. William Hebb,
6. Elisha D. Berry,
7. John B. Boond,
8. Jacob Noyes,
9. Singleton Townsend,
10. John M. Millard,
11. Philip Hines,
12. Thomas Burch.

Jury sworn. Verdict for Plaintiff.

Who, being empannelled and sworn to say the truth in the premises, upon their oath do say, that they find the issues in fact joined in this cause for the plaintiff; and that the rent distrained for and claimed in the cognizance or avowry in this cause was not, nor is not in arrear and unpaid, nor was, nor is any part of it in arrear to the said William S. Moore, as the said John Lloyd above in pleading hath alleged; and they assess the damages of the said John Lloyd, by reason of the taking and unjustly detaining of the goods and chattels aforesaid, to the sum of one cent, current money; whereupon the said John Lloyd, by his said attorney, prays judgment against the said defendant of and upon the verdict aforesaid, by the jurors aforesaid, given in form aforesaid.

Motion for new trial.

And the said Charles Scott, bailiff of William S. Moore, by his said attorney saith, that the court here ought not to proceed to render judgment upon the said verdict, and prays that the said verdict may be set aside, and that the issues aforesaid may be tried anew by other jurors, to be afresh empannelled; and file in court here the following reasons, to wit:

LLOYD
vs. } Reasons for new Trial.
SCOTT.

1st. Because the court misdirected the jury as to the law applicable to the case.

2d. Because the jury misconceived the instructions given by the court to the jury.

3d. Because the verdict was against law.

4th. Because the verdict was against the evidence.

5th. Because the verdict was without evidence.

COXE, for defendant.

June 12th, 1836.

Verdict set aside, and new trial granted.

Whereupon, all and singular the premises being seen, heard, and after argument of counsel, and the matter being fully understood, and mature deliberation being thereupon had, for that it appears to the court here, that the verdict aforesaid, be set aside and held as entirely void and of no force or effect, and that the issues aforesaid be tried anew by other jurors to be afresh empannelled: it is thereupon considered by the court here that the said John Lloyd recover against the said Charles Scott, bailiff of William S. Moore, the sum of $ for his costs and charges by him expended at this term, by occasion of the premises and trial aforesaid. Therefore let a new jury thereon appear here, on the fourth Monday of November next, by whom, &c., and who neither, and so forth, to recognize, and so forth, because as well, and so forth; and the same day is given to the said parties then and there, and so forth.

November Term, 1832. Appearance of parties.

And now, to wit, the said fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-two, comes into the circuit court here, as well the said John Lloyd by his attorney aforesaid, as the said Charles Scott, bailiff of William S. Moore, by his attorney aforesaid.

Order to empannel Jury.

Whereupon, for trying the issues aforesaid, it is ordered by the court here, that twenty persons, from the pannel of petit jurors returned to the court here by the marshal, be drawn by ballot, according to the law in such cases made and provided; thereupon, the twenty persons being so drawn and written on two lists, one of which said lists was delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, the remaining twelve persons being called, come, to wit:

Jurors' names.

1. John D. Clark,
2. Charles Wood,
3. Philip Williams,
4. Robert Coltman,
5. Nathan W. Fales,
6. Henry Barron,
7. William Orme,
8. Thomas Beall,
9. Gideon Davis,
10. Edward N. Roach,
11. George Lamb,
12. Peter Griffin.

Jury sworn. Verdict for plaintiff.

Who, being empannelled and sworn to say the truth in the premises, upon their oath do say, that they find the issues in fact joined in this cause for the plaintiff; and that the rent distrained for and claimed in the cognizance or avowry in this cause, was not in arrear and unpaid, nor was any part of it in arrear and unpaid to the said William S. Moore, as the said John Lloyd above in pleading hath alleged; and they assess the damages of the said John Lloyd, by reason of the taking and unjustly detaining of the goods and chattles aforesaid, to the sum of one cent current money.

Judgment on verdict.

Therefore it is considered by the court here, that he the said John Lloyd have the goods and chattels in the said declaration mentioned, to be held by him irrepleviable forever. And it is also considered by the court here, that the said John Lloyd recover against the said Charles Scott, bailiff of William S. Moore, as well the sum of one cent current money his damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, also the sum of two hundred fifty-one dollars and fifteen cents, ($251 15) by the court here unto him on his assent adjudged for his costs and charges, by him about his suit in this behalf laid out and expended; and the said Charles in mercy and so forth.

March Term, 1835.

And the said Supreme Court by its mandate aforesaid, having certified that it had reversed and annulled the judgment aforesaid, and ordered the circuit court here to set aside the verdict aforesaid, and award a venire facias de novo:

Venire ordered.

Whereupon it is ordered by the court here, that for trying the issue aforesaid, a jury thereon appear before the court here on the fourth Monday of November next, by whom &c., and who neither &c., to recognize &c., because as well &c., the same day is given the said parties then and there &c.

November Term, 1835. Appearance of parties.

At which said fourth Monday of November, in the year eighteen hundred and thirty-five, comes again into the circuit court here, as well the said John Lloyd by his attorneys aforesaid, as the said Charles Scott, bailiff of William S. Moore, by his attorneys aforesaid.

Cause continued.

And thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is continued until the fourth Monday of March next.

March Term, 1836. Appearance of parties.

And now at this day, to wit, the said fourth Monday of March, in the year eighteen hundred and thirty-six, comes again into the circuit court here as well the said John Lloyd by his attorneys aforesaid, as the said Charles Scott, bailiff of William S. Moore, by his attorneys aforesaid.

Order to empannel Jury.

Whereupon for trying the issue aforesaid, it is ordered by the court here, that twenty persons, from the pannel of petit jurors returned to the court here by the marshal, be drawn by ballot, according to the law in such cases made and provided. Thereupon the twenty persons being so drawn and written on two lists, one of which said lists was delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, the remaining twelve persons being called, come, to wit:

Jurors' names.

1. George Semmes,
2. James Owens,
3. John H. King,
4. Abner H. Young,
5. Walter Clarke,
6. William Waters,
7. William Eaton,
8. Alexr. Borland,
9. David Swett,
10. Alexr. Shepherd,
11. Thomas Griffin,
12. William H. Eddes.

Jury sworn. Verdict for plaintiff.

Who being empannelled and sworn to say the truth in the premises, upon their oath do say, that they find the issues in fact joined in this cause for the plaintiff; and that the rent distrained for and claimed in the cognizance or avowry in this cause, was not in arrear and unpaid, nor was any part of it in arrear and unpaid to the said William S. Moore, as the said John Lloyd above in pleading hath alleged. And they assess the damages of the said John Lloyd by reason of the taking and unjustly detaining of the goods and chattels aforesaid, to the sum of one cent current money.

Judgment on verdict.

Therefore it is considered by the court here, that he said John Lloyd have the goods and chattles in the said declaration mentioned, to be held by him irrepleviable forever. And it is also considered by the court here, that the said John Lloyd recover against the said Charles Scott, bailiff of William S. Moore, as well the sum of one cent current money, his damages aforesaid by the jurors aforesaid, in form aforesaid assessed, as also the sum of eighty-eight dollars and fifty-seven cents, by the court here unto him on his assent adjudged, for his costs and charges by him about his suit in this behalf laid out and expended. And the said Charles in mercy and so forth.

Memorandum.--Before the jurors last aforesaid withdrew from the bar of the court here, the said Charles Scott, bailiff of William S. Moore, by his attorney aforesaid, filed in court here the following bill of exceptions, to wit:

Defendant's exceptions.

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In the trial of this cause, the plaintiff in support of the issues on his part offered in evidence the deposition of Jonathan Scholfield (copied at page 23, &c. ;) and the defendant's counsel objecting to the competency of said Scholfield as a witness, the plaintiffs offered in evidence the following releases, (copied at page 26, 29, 30, &c.,) and also read by consent the testimony of all the witnesses except that of said Jonathan Scholfield, as stated in the former record. And thereupon the defendant's counsel prayed the court that said Scholfield was an incompetent witness, notwithstanding the said releases, and objected to his deposition being read in evidence.

But the court was of opinion that he was a competent witness, and that said deposition was admissible, and allowed the same to be read in evidence to the jury. To which opinion and admission the defendants except and pray the court to sign and seal this bill of exceptions, which is accordingly done this 9th day of June, 1836.

W. CRANCH, [SEAL.]
JAMES S. MORSELL, [SEAL.]

Mandate from Supreme Court, referred to at page 16.

UNITED STATES OF AMERICA, sct.

The President of the United States of America, to the honorable the judges of the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, Greeting:

Whereas lately at a circuit court of the United States for the District of Columbia, holden in and for the county of Alexandria, before you or some of you, in a cause wherein John Lloyd was plaintiff, and Charles Scott, bailiff of William S. Moore, use of John McKim jr. was defendant, in an action of replevin, the judgment of the said circuit court was in the following words, to viz: "It is therefore considered by the court that the said John Lloyd take nothing by his writ aforesaid, but for his false clamor therein be in mercy, and that the said Charles Scott, for the use of the said William S. Moore, and as his bailiff, go thereof without day, and recover from the plaintiff the sum of one thousand dollars, being double the value of the rent distrained for, with full costs of suit, &c;" as by the imperfection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of January in the year of our Lord one thousand eight hundred and thirty, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record and was argued by counsel: on consideration whereof it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with instructions to overrule the demurrer to the second and fourth pleas, to permit the defendant to plead, and for such further proceedings as to law and justice may appertain.

February 27, 1830.

You therefore are hereby commanded, that such further proceedings be had in the said cause as according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the honorable John Marshall, chief justice of said Supreme Court, the second Monday in January, in the year of our Lord one thousand eight hundred and thirty.

W. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Deposition of Jonathan Scholfield.

STATE OF INDIANA,
Marion County, ss.

Be it remembered, and it is hereby certified, that on this 18th day of July, 1835, in the State and county aforesaid, before me, Joshua Stevens, an associate judge of the circuit court of Indiana, for said county, personally appears Jonathan Scholfield, being about the age of fifty-nine years, a witness for the plaintiff in a certain civil cause now depending in the circuit court of the United for the District of Columbia for the county of Washington, wherein John Lloyd is plaintiff, and Charles Scott, bailiff for William S. Moore, is defendant, and that said witness (who is one of the religious denomination of Friends or Quakers) being by me first carefully examined and cautioned and affirmed to testify the whole truth, affirms and says as stated in the following answers to the plaintiff's interrogatories.

1. Question by plaintiff. Are you interested in the result of this suit?

Answer. I am not. On the 13th June, 1831, I for a valuable consideration transferred and assigned my interest in the suit to the plaintiff, whereby

I considered myself totally absolved from all responsibility on that account; and I have received a release executed by said Lloyd, a duplicate of which is hereto annexed, dated the 24th day of March, 1835, marked in my handwriting No. 1 (copied in page 26.)

Question 2d. Will you be so good as to examine the paper now shown you, purporting to be an office copy of an indenture from yourself and wife to William S. Moore, bearing date the 11th day of June, 1814, and state whether you executed such an instrument, and all the circumstances relative to the subject matter thereof?

Answer. I have examined the office copy of the deed from myself and wife to William S. Moore, dated the 11th of June, 1814, which I have marked No. 2 (copied in page 27) that it may be annexed to this deposition. Such a deed was drawn by Robert J. Taylor of Alexandria, and executed by myself and wife. The circumstances which induced the making that deed are these: In June, 1814, being desirous of procuring a loan of 5,000 dollars, I applied to William S. Moore, a money lender of Alexandria, to raise or borrow that sum from him, for which I proposed to allow him ten per cent. and to secure it by an annuity or ground rent on the houses mentioned in the deed for one year; he objected to letting me have it for so short a period, but offered to let me have it for ten years upon my giving the proposed security; to this I objected, insisting for a shorter period for the loan. After much discussion we agreed to split the difference, and it was agreed that I was to keep the money for five years upon security offered.

Question 3d. Was any other interest than ten per cent. mentioned?

Answer. No other interest than ten per cent. was mentioned.

Question 4th. Was or was not the object for which the money was wanted stated?

Answer. I do not recollect that I informed him why I wanted the money, but only that I wanted to raise so much money.

Question 5th. In discussing the subject with Mr. Moore as to the period for which you were to keep the money, did you or did you not inform him whether your object was to have the use of the money for a limited or an unlimited period?

Answer. I do not recollect that I stated that my object was to have the money for a limited time only, but stated that I wished to have the privilege of returning the money as soon as possible, which already appears from what is before answered, and is evident from the nature of the transaction.

Question 6th. Where, and in whose presence did the conversation between Mr. Moore and yourself, take place?

Answer. I think the first conversation with Moore upon this subject took place at his sugar-house, between ourselves. I afterwards met him at R. J. Taylor's office for the purpose of having the papers drawn; the meeting at R. J. Taylor's was the second or third that William S. Moore and myself had; my impression is, that Moore informed me he wished to consult Robert J. Taylor; there was such a consultation. Robert J. Taylor drew the deed according to our agreement, and I presume in accordance to instructions received from Moore and myself.

Question 7th. Had the terms been agreed upon or not, before you went to see Mr. Taylor?

Answer. My impression is, that the terms had been agreed upon before we went to R. J. Taylor's; and that he was told I was to keep the money for five years, and then to have the privilege of returning it, but not sooner; the money was had, I think, by a check on the bank of Potomac, and the deed executed. The property was subject to a previous incumbrance to Andrew Scholfield, but it was arranged so as to be postponed to William S. Moore.

Question 8th. Had you any conversation with Mr. Taylor upon the suject, before you and Mr. Moore met at his office?

Answer. I do not recollect that I had, though it is possible I might; I met William S. Moore there by appointment.

Question 9th. State whether or not you ever applied to Robert J. Taylor to procure the money you wanted.

Answer. I have no recollection of having applied to Mr. Taylor, except to prepare the papers between Moore and myself; my first application was to Williem S. Moore himself without any intervention.

Question 10th. What was the value of the property embraced in your deed to Moore?

Answer. I sold the houses I think, agreeing to finish them, for about twenty-four thousand dollars, having got thirty thousand dollars for five houses, which included the four covered by Moore's deed; when first finished they rented for 400 dollars each.

Question 11th. When you made your application to Moore, did you or not represent yourself as desiring to make a sale of your property or of any interest in it by way of sale?

Answer. I think it clear from what I before stated, and from the nature of the transaction, that I had no intention to make a final disposition of *of* the property; I was desirous of redeeming it as soon as possible, and my first proposition was that I should have the privilege of doing so in one year, and that until*l* I did so I was to pay him ten per cent. interest, and I believe W. S. Moore expected I would redeem at the end of five years.

Question 12th. Does the deed truly express the object of the parties and the terms on which Moore proposed to advance the money, except as to the period of redemption?

Answer. I wished to obtain the money with the privilege of returning it in one year if convenient; he wishes it to be irredeemable for ten years; five was finally agreed upon. Both parties must have understood the object of the deed, to have been to secure the money advanced—whether the object is answered by the deed is for others to decide.

Question 13th. What was the general understanding in Alexandria as to Moore's being a money lender? Was he considered a money lender or not?

Answer. It was generally considered that he was a moneyed man and would advance money on security he approved of.

Question 14th. By whom were the yearly rents under the deed to Moore paid?

Answer. The rents were paid by me as long as I had the property. After I sold it to John Lloyd I believe he paid them until*l* he received notice to make no further payments.

Question 15th. How came you to give notice to John Lloyd to withhold the payment of the rent?

Answer. My affairs had become embarrassed; Moore had, I suppose, at the time I gave the notice received about ten years rent, which would amount to the sum he had advanced, which, considering the transaction usurious, I thought as much as he was entitled to, and that the rest ought to go to my other creditors.

JONA. SCHOLFIELD.

And I do further certify that the reason for taking the said deposition of Jonathan Scholfield is, that the said witness, Scholfield, lives in the aforesaid county of Marion, in the State of Indiana, and at a greater distance than one hundred miles from the place of trial of the before mentioned cause.

And I do further certify, that before the above deposition was taken, there was delivered in my presence to said witness, by the attorney for the plaintiff, the annexed release or instrument of writing from John Lloyd to the witness, Jonathan Scholfield, bearing date the 24th day of March, 1835, and that a duplicate original release was also at the same time delivered as aforesaid to the said Scholfield, and accepted and retained by him.

And I do further certify, that I am not of counsel or attorney to either of the parties or any person interested in the event of said cause. And also that the said deposition was reduced to writing by me, and signed by the witness in my presence, and being so written and signed, was, together with the other papers referred to by the witness in his deposition, and thereto annexed, carefully sealed up by me, and by me directed to the circuit court of the United States for the District of Columbia, for the county of Washington.

In testimony whereof, I have hereunto set my hand and affixed my seal, this 18th day of July, 1835.

JOSHUA STEVENS, [SEAL.]
Associate Judge of Marion county.

INDIANA, to wit:

I, William Sheats, Secretary of State of the State aforesaid, certify that Joshua Stevens, before whom the foregoing deposition was taken, was at the time of taking the same, and still is an associate judge of the circuit court of Marion county, in said State, duly commissioned and qualified, and that full faith and credit are due to his official acts as such.

In testimony whereof, I hereunto set my hand and affix the seal of said State. Done at Indianapolis, this 18th day of July, 1835.

WM. SHEATS, [SEAL.]

No. 1. Release from John Lloyd to J. Scholfield.

Whereas Jonathan Scholfield did, in a certain writing dated "Alexandria, June 9, 1824," give me notice to withhold from William S. Moore the payment of any further money on account of a rent charge of five hundred dollars created and granted by the said Scholfield to the said Moore on the property which I hold under the said Scholfield, upon the ground that he considered the contract by which said rent was created to be usurious; in which said writing the said Scholfield stated that he should take measures to set aside the said rent charge, and moreover did promise therein that in case distress should be made upon me for said rent, he would stand me harmless if I would resist such distress, by writ of replevin ; and further did state in said writing, that if I made any further payment after receiving said notice, the same should be made at my own risk:

Now know ye that I, John Lloyd, do hereby release and for ever discharge the said Jonathan Scholfield, his heirs, executors, and administrators, from all obligation, liability, or responsibility to me created, expressly or impliedly, by the said notice and promise, either to take measures to set aside the contract creating said rent charge, or to stand me harmless in case I should resist the payment of the said rent by writ of replevin; and I do moreover release and forever discharge the said Jonathan Scholfield, his heirs, executors, and administrators, from all liability or responsibility, for or on account of the suit in replevin, originally brought by me in the circuit court of the District of Columbia, for Alexandria county, and which was removed to and is now depending in the said circuit court for the county of Washington, and also from all liability or responsibility for or on account of all or any costs which I have at any time or in any manner incurred, or been liable for or have paid or may be called on to pay for or on account of the said suit in replevin, having been brought by me to resist the payment of said rent charge, and from all costs which I am now in any manner liable to pay to any one on account of the same, or may hereafter in any manner be liable for on account of said suit, either in law or equity. And I the said John Lloyd do hereby also release and forever discharge the said Jonathan Scholfield, his heirs, executors, and administrators, of and from all responsibility, liability, claim and demand whatsoever, which I the said Lloyd now have, or which I or my heirs, executors, administrators, or assigns hereafter may or can or might or could have against the said Scholfield, his heirs, executors, or administrators, for or by reason of his deed to me, dated on or about the 29th of October, 1816, to which said deed Andrew Scholfield is a party of the third part, and by which the said Jonathan Scholfield, and his wife, Eleanor, conveyed to me and my heirs the land, houses and property aforesaid, on and out of which the aforesaid rent charge of $500 to William S. Moore is granted and created, and also all claim or demand whatsoever, that I or my heirs, executors, administrators, or assigns, might or could have for or by reason of any matter or thing connected with or in any manner growing out of the deed and notice aforesaid, or either and each of them.

In witness whereof, I have hereto set my hand and seal, this twenty-fourth day of March, in the year 1835.

JOHN LLOYD, [SEAL.]

Signed, sealed and delivered in the presence of—
EDM. I. LEE,
CASSIUS F. LEE.

No. 2. Deed from Scholfield to Moore, referred to at pages, 9, 10, 12, 14, 24.

This indenture, made this eleventh day of June, in the year one thousand eight hundred and fourteen, between Jonathan Scholfield and Eleanor his wife, of the town of Alexandria in the District of Columbia of the one part, and William S. Moore of the same town of the other part, witnesseth, that the said Jonathan Scholfield and Eleanor his wife in consideration of the sum of five thousand dollars to the said Jonathan Scholfield, by the said William S. Moore, in hand paid, of which the receipt is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to the said William S. Moore, his heirs and assigns, forever, one certain annuity or rent of five hundred dollars to be issuing out of, and charged upon a lot of ground and four brick tenements and appurtenances thereon erected, on the east side of Washington street, and the north side of Duke street, in the said town of Alexandria, bounded as follows: beginning at the intersection of the said streets, thence north on Washington street eighty seven feet more or less to the partition wall between the fourth and fifth tenements from Duke street; thence east parallel to Duke street, and with the said partition wall one hundred and twelve feet to an alley; thence with the line of the said alley eighty-seven feet to Duke street; thence on Duke street west to the beginning; to be paid to the said William S. Moore, his heirs and assigns, by equal half yearly payments, $250 dollars on the 10th day of December, and on the 10th day of June forever hereafter, to hold the said annuity or rent to the said William S. Moore, his heirs and assigns, to his and their only proper use forever. And the said Jonathan Scholfield, for himself, his heirs, and executors, administrators, and assigns, does hereby covenant with the said Wm. S. Moore, his heirs and assigns, as follows: that is to say, that he the said Jonathan Scholfield, his heirs and assigns, will well and truly pay to the said Wm. S. Moore, his heirs and assigns, the said annuity or rent of $500 by equal half yearly payments on the 10th day of June, and on the 10th day December in each year forever hereafter, as the same shall become due, and that if the same be not punctually paid, then it shall be lawful for the said Wm. S. Moore, his heirs and assigns, from time to time on every such default, to enter on the premises charged, and to levy by distress and sale of the goods and chattles there found, the rent in arrear and the costs of distress and sale; and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said William S. Moore, his heirs and assigns, to enter on the premises charged, and from thence to remove and expel the said Jonathan Scholfield, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate forever thereafter. And further, that the said Jonathan Scholfield is now in his own right seized in fee simple in the premises charged as aforesaid, free from any consideration or encumbrance other than such as are specified and provided for in a deed from the said Jonathan Scholfield to Robert J. Taylor, dated the day before the date hereof; and that he the said Jonathan Scholfield, his heirs and assigns, will forever hereafter keep the buildings and improvements which now or hereafter may be erected on the premises charged, fully insured against fire in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said William S. Moore, his heirs or assigns, may appoint, to the intent that if any damage or destruction from fire shall happen the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged; and that he the said Jonathan Scholfield, his heirs and assigns, will execute and deliver any further conveyance which may be necessary more completely to charge the premises before described with the annuity aforesaid, to carry into full effect the intention of the parties hereto. And lastly, that he and his heirs will forever warrant and defend the annuity or rent hereby granted to the said Wm. S. Moore, his heirs and assigns, against any defalcation or deduction for or on account of any act of him, his heirs or assigns. And the said William S. Moore, for himself, and his heirs and assigns, does hereby covenant with the said Jonathan Scholfield, his heirs and assigns, that if the said Jonathan

Scholfield, his heirs and assigns, shall at any time after the expiration of five years from the date hereof, pay to the said William S. Moore, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent and a ratable dividend of the rent for the time which shall have elapsed between the half year's day then next preceding, and the day on which such payment shall be made, he the said William S. Moore, his heirs and assigns, will execute and deliver any deed or instrument which may be necessary for releasing and extinguishing the rent or annuity here created, which on such payments being made shall forever after cease to be payable.

In testimony whereof, the parties to the indenture have hereto set their hands and seals, the day and year first before written.

JONATHAN SCHOLFIELD, [SEAL.]
ELEANOR SCHOLFIELD, [SEAL.]
WILLIAM S. MOORE. [SEAL.]

Sealed and delivered in the presence of—
Wm. Jolliffe,
Ho. C. Scott,
Thos. K. Beale,
Benjamin Baden.

At an United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the 2d day of December, 1814, this deed from Jonathan Scholfield and Eleanor, his wife, to Wm. S. Moore, was proved by the affirmation of Wm. Jolliffe and Thomas K. Beale and the oath of Benjamin Baden to be the act and deed of the parties, which, together with a commission for the privy examination of Eleanor Scholfield, wife of said Jonathan, and ordered to be recorded.

Teste, G. DENEALE, C. C.
A copy Teste, EDM. I. LEE, C. C.

District of Columbia,
Alexandria County, sct.

I, Edmund I. Lee, clerk of the United States circuit court of the District of Columbia for the county of Alexandria, do hereby certify that the foregoing deed from Jonathan Scholfield and wife to William S. Moore, is truly copied from the land records of my office.

In witness whereof I hereto set my hand and affix the seal of the said court, this 4th day of July, 1835.

[SEAL] EDM. I. LEE, Clerk.

A.

Release from Lloyd to Scholfield.

Whereas Jonathan Scholfield has in two several notices to me, dated the 23d day of February, 1824, and 9th June, 1824, required me not to pay Wm. S. Moore a ground rent of five hundred dollars, or any part thereof, secured on sundry three story brick houses on Washington and Duke streets in Alexandria, agreed to save me, John Lloyd, harmless for not paying the said ground rent to the said Wm. S. Moore:

Now I, the said John Lloyd, do hereby release and discharge the said

Jonathan Scholfield from his said obligation to me contained in his said notices.

Given under my hand and seal this 4th day of November, 1828.

JOHN LLOYD, [SEAL.]

Signed, sealed and delivered in presence of
A. NEWTON.

Release from Scholfield to Lloyd.

Whereas it is supposed that I, Jonathan Scholfield, of the county of Alexandria and District of Columbia, may have an interest in a certain suit now pending in the circuit court of the District of Columbia for the county of Washington, in the name of John Lloyd against Charles Scott, as bailiff of William S. Moore, in a certain writ of replevin, or in a certain annuity or rent, purporting to have been granted by me to the said William S. Moore, and charged on certain brick buildings situated on the east side of Washington street, and on the north side of Duke street, in the said town of Alexand*er*, or in the said buildings on which the same is so charged, or in and to the sum of money secured, or intended to be secured to the said William S. Moore, by my deed of Indenture, bearing date the eleventh day of June, 1814, and hereto annexed:

Now know ye, that in consideration of the sum of five thousand dollars released to me by the said John Lloyd, out of a debt due from me to the said Lloyd, and for other good and valuable considerations me thereunto moving, I do hereby grant, bargain, and sell, assign, transfer, and set over to him the said John Lloyd, all my right, title, and interest, which I have or may hereafter have in the said suit, or which may arise, or hereafter arise to me from the decision of the said suit, or which I have in the said annuity or rent charge, or which I may hereafter have in case the said John Lloyd should succeed in the said suit, or which I now have, or may hereafter have to the brick buildings upon which the said annuity or rent charge is secured, and in and to all and every of the said premises or either of them. And I do hereby further release and discharge the said John Lloyd from all covenants and obligations expressed or implied, arising out of my deed of assignment of the said brick buildings and premises to him, bearing date the ninth day of October, 1816, (and also hereunto annexed,) and also from all claims, demands, actions or causes of action which now exist, and which may hereafter arise or accrue to me, under and by virtue of the said deed of the 9th of October, 1816, or the preceding deed hereinbefore referred to.

In witness whereof I have hereunto set my hand and affixed my seal this 13th day of June, 1831.

JONA. SCHOLFIELD, [SEAL.]

Sealed and delivered in presence of
EDM. I. LEE.

Release from Scholfield to Lloyd.

Whereas it is supposed that I, Jonathan Scholfield, of the county of Alexandria, and District of Columbia, may have an interest in a certain suit now pending in the circuit court of the District of Columbia and county of Alexandria, in the name of John Lloyd against Charles Scott, as bailiff of William S. Moore, on a certain writ of replevin, or in a certain annuity or rent purporting to be granted to said William S. Moore by me, and charged on certain three story brick tenements, situate on the east side of Washington street, and on the north side of Duke street, in the town of Alexandria, or in the said tenements on which the same is so charged, or in or to the sum of money thereby secured, or intended to be secured:

Now know ye, that I, the said Jonathan Scholfield, have granted, released, surrendered, assigned, and set over, and by these presents do for myself, my heirs, executors and administrators, freely and absolutely grant, release, surrender, assign, and set over unto the said John Lloyd, his heirs, executors, administrators, and assigns, all the right, title, interest, and estate whatsoever, which I the said Jonathan, or my heirs, executors or administrators, might, can, shall, or may have or claim, into *to* the said suit, annuity, rent, or tenements, and in and to all sum or sums of money thereon secured, or intended to be secured, and in and to all and every of the said premises or either of them, and thereof and therefrom, and of and from all actions, suits and demands, which I, my heirs, executors, or administrators may have concerning the same, do hereby forever acquit and discharge the said John Lloyd, his heirs, executors and administraters, by these presents.

In testimony whereof, I have hereunto set my hand and seal, this 25th day of April, 1828.

JONA. SCHOLFIED, [SEAL.]

Signed, sealed and delivered in presence of
Sidney W. Smith,
Edm. I. Lee.

Release from Beale and McRae to Scholfield.

Whereas Jonathan Scholfield stands indebted to us, Thomas K. Beale and James M. McRea of the town of Alexandria, in the District of Columbia, to wit, in or about the sum of two thousand dollars, and we have agreed absolutely to discharge and release the said Jonathan from the payment of the sum of nine hundred and fifty dollars, a part thereof:

Now know ye, that we the said Thomas K. Beale and James M. McRea, have and do hereby release, surrender, assigns and set over, and by these presents do for ourselves, our heirs, executors, administrators, and assigns, release, surrender, assign and set over unto the said Jonathan Scholfield, his executors, administators, and assigns, the said sum of nine hnndred and fifty dollars, part of the debt aforesaid, and we do forever discharge him the said Jonathan, his executors and administrators, from the payment of the same or any part thereof.

As witness our hands and seals this 25th day of April, 1828.

THOMAS K. BEALE, [SEAL.]
JAS. M. McREA, [SEAL.]

Signed, sealed and delivered in presence of
Sidney W. Smith,
Edm. I. Lee.

Release from J. Smith to Scholfield.

Whereas Jonathan Scholfield stands indebted to me, Joseph Smith, of the town and county of Alexandria, in the District of Columbia, in the sum of three thousand dollars, by two judgments in the circuit court of Alexandria, District of Columbia, with costs and interest: I do hereby agree absolutely to discharge and release the said Jonathan Scholfield from the payment of eleven hundred and fifty dollars:

Now know ye, that I the said Joseph Smith, have released and surrendered, assigned and set over, and by these presents do for myself, my executors, administrators and assigns, release and surrender, assign and set over unto the said Jonathan Scholfield, his executors, administrators and assigns, the sum of eleven hundred and fifty dollars, a part of the debt aforesaid, due me, and do forever discharge him the said Jonathan Scholfield, his heirs, executors and administrators, from the payment of the same or any part thereof.

As witness my hand and seal this 25th day of April, 1828.

JOSEPH SMITH, [SEAL.]

Signed, sealed and delivered in presence of
SIDNEY W. SMITH.

Release from W. Veitch and B. Wheat, to Scholfield.

Whereas Jonathan Scholfield stands indebted to us, William Veitch and Benoni Wheat, formerly trading under the firm of Willliam Veitch & Co., of the town of Alexandria, in the District of Columbia, to wit: in or about the sum of eight hundred dollars; and we have agreed absolutely to discharge and release the said Jonathan Scholfield from the payment of the sum of two hundred and fifty dollars, a part thereof: Now know ye, that we the said William Veitch and Benoni Wheat, have, and do hereby release and surrender, assign and set over, and by these presents do, for ourselves, our heirs, executors, administrators and assigns, release, surrender, assign, and set over unto the said Jonathan Scholfield, his executors, administrators and assigns, the said sum of two hundred and fifty dollars, part of the debt aforesaid. And we do forever discharge him, the said Jonathan, his executors and administrators, from the payment of the said sum, or any part thereof, as witness our hands and seals, this 25th day of April, 1828.

WILLIAM VEITCH, [SEAL.]
BENONI WHEAT, [SEAL.]

Signed, sealed and delivered in the presence of
JAS. H. ALLSTON,
EDM. I. LEE.

Release from J. Lloyd to Scholfield.

Whereas Jonathan Scholfield stands largely indebted to me, John Lloyd, of the county of Fairfax, and State of Virginia, to wit: in or about the sum of fifteen thousand dollars; and I have agreed absolutely to discharge and release the said Jonathan from the sum of five thousand dollars, part thereof: Now know ye, that I, the said John Lloyd, have released, surrendered, assigned, and set over, and by these presents do, for myself, my executors, administrators and assigns, release, surrender, assign, and set over, unto the said Jonathan Scholfield, his executors, administrators and assigns, the sum of five thousand dollars, part of the debt aforesaid; and do forever discharge him the said Jonathan, his executors and administrators, from the payment of the same.

JOHN LLOYD, [SEAL.]

Signed, sealed and delivered in the presence of
SIDNEY W. SMITH,
EDM. I. LEE.

C.

Certificate of E. I. Lee, Jr.

I certify that the release from John Lloyd of Alexandria, to Jonathan Scholfield, dated 24th day of March, 1835, and acknowledged before Edm. I. Lee and Cassius F. Lee, as witnesses, which is annexed to the deposition of the said Jonathan Scholfield taken before Joshua Stevens, associate judge for the county of Marion, in the State of Indiana, on the 18th of July 1835, in the suit of the said John Lloyd against Charles Scott, bailiff of William S. Moore, depending in the circuit court of the District of Columbia, for the County of Washington, was by me, as the agent and attorney of the said John Lloyd, delivered to the said Jonathan Scholfield, and by him received before he was examined and his deposition taken; and I do further certify, that a duplicate of the said release was left with, and retained by said Jonathan Scholfield.

EDM. I. LEE, Jr.

SHEPHERDSTOWN,
Dec. 30th, 1835.

JEFFERSON COUNTY, *Sct.*

Edm. I. Lee, Jr. made oath before the subscriber, a justice of the peace for the county aforesaid, that the facts set forth in the foregoing certificate signed by him, are true.

Given under my hand this 30th day of December, 1835.

DANL. MORGAN.

Writ of error produced and filed. Clerk's certificate.

And whereas, afterwards, to wit, on the tenth day of December, in the year of our Lord one thousand eight hundred and thirty-six, the said Charles Scott, as bailiff of William S. Moore, by his attorney aforesaid, produced and filed in court, had the United States writ for the correcting of errors of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the County of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof I have hereto subscribed my name, and affixed the [L. S.] public seal of the said circuit court for the county aforesaid, this eighteenth day of January, Anno Domini 1837.

W. BRENT, Clerk.

G.

Certificate of E. I. Lee, Jr.

I certify that the release from John Lloyd of Alexandria, to Jonathan Schofield, dated 24th day of March, 1819, and acknowledged before Edm. I. Lee, then Mayor of the town of Alexandria, which is annexed to the depositions of the said Jonathan Schofield taken before Joshua Stevens, associate judge for the county of Alexander, in the State of Illinois, on the 16th of July 1833, in the suit of the said John Lloyd against Charles Scott, bailiff of William S. Moore, depending in the circuit court of the District of Columbia, for the County of Washington, was received by me as the agent and attorney of the said John Lloyd, delivered to said Jonathan Schofield, and by him received before he was examined as the deposition taken; and I do further certify, that a duplicate of the said release was left with, and retained by said Jonathan Schofield.

EDM. I. LEE, Jr.

Sworn before me,
Dec. 30th, 1843.

ALEXANDRIA COUNTY, Sct.

Edm. I. Lee, Jr. made oath before me the subscriber, a justice of the peace for the county aforesaid, that the facts set forth in the foregoing certificate signed by him are true.

Given under my hand this 30th day of December, 1843.

[illegible]

Writ of error produced and filed. Clerk's certificate.

And whereas, afterwards, to wit, on the [illegible] day of December, in the year of our Lord one thousand eight hundred and forty-six, the said Charles Scott, as bailiff of William S. Moore, by his attorney aforesaid, produced and filed in court here the United States writ for the correcting of errors of and upon the judgment aforesaid, directed to the justices of the circuit court of the District of Columbia, for the County of Washington, and in obedience thereof, the [illegible] by the laws and usage of the law in such case made and provided, a transcript of the record of proceedings in the judgment aforesaid, and all things concerning the same, with the writ of error aforesaid, and a copy of the citation and bond hereto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof I have hereto subscribed my name, and affixed the [L. S.] seal of the said circuit court for the county aforesaid, this eighteenth day of January, Anno Domini 1847.

W. BRENT, Clerk.

NORTH CAROLINA CIRCUIT COURT U. S.

No. 26.

POSTMASTER GENERAL

VS.

NANCY WHITFIELD, HENRY BLOUNT, & SAML. W. VICK.

FILED FEBRUARY 10, 1837.

United States of America, } *Circuit Court—Fifth Circuit.*
North Carolina District. }

At a circuit court of the United States, begun and held at Raleigh, on the 12th day of November, in the year of our Lord one thousand eight hundred and thirty-six. Present: the honorable Philip P. Barber and Henry Potter, judges of said court.

The Postmaster General against Nancy Whitfield, Henry Blount, and Samuel W. Vick.

This is an action of debt, upon the bond given by the said defendant, Nancy Whitfield, upon being appointed Postmaster at Nashville in North Carolina. The writ was issued the thirteenth day of May in the year of our Lord one thousand eight hundred and thirty-four; and bore *test* of the day previous, viz: the twelfth day of that month. The breach assigned was the non-payment, by the defendant, Nancy, of the sum of four hundred and twenty-nine dollars and five cents, which was the aggregate amount of her returns of postages received during the quarters beginning the first day of July, 1830, and continuing until her removal from office on the 19th day of May, 1833.

The defendants relied upon the third section of the act of Congress, approved the 3d day of March, A. D. 1825, entitled an act to reduce into one the several acts establishing and regulating the Post Office Department, as a bar to the action.

Upon the trial, the Attorney of the United States produced an account under the seal of the Post Office Department, in which the defendant, Nancy, was charged with her regular returns from the first day of July, 1830, until the 19th of May, 1833, in which there was no credit for payments made, either to the Department or according to its directions, and thereupon the following questions arose:

1st. Whether the account did not prove a default on the defendant, Nancy, more than three years before the suit was brought?

2d. If not, whether it was not to be left to the jury as evidence from which they were at liberty to infer such defraud if they thought such inference proper?

3d. Whether the sureties, the defendants Henry and Samuel, were bound to produce distinct affirmative proof of a demand or direction from the Postmaster General for the payment of the amount stated in the said account to be due, and a refusal to comply with such demand or direction by the defendant, Nancy, or whether they might not leave a default to be inferred by the jury from the date of the several items of the amount?

4th. Whether, if there be a default not proceeded upon by suit for three years, the act of Congress above mentioned does not discharge the sureties, the defendants Henry and Samuel, from all liability on the bond, or is the effect of the act only to discharge them as to the default of three years' standing?

On which questions the opinions of the judges were opposed.

Whereupon, on the motion of the Attorney for the United States, that the points on which the disagreement hath happened might be stated under the direction af the judges, and certified under the seal of the court to the Supreme court to be finally decided, it is ordered, that the foregoing state of the pleadings and statement of facts, together with the said differences in opinion, be certified according to the motion of the said attorney, and to the act of Congress in such case made and provided.

UNITED STATES OF AMERICA, } *Fifth Circuit.*
NORTH CAROLINA DISTRICT. }

I, William H. Haywood, clerk of the circuit court of the United States, for the district aforesaid, do hereby certify the foregoing to be a copy from the minutes of the court.

Given under my hand and seal of office, at office, this sixth day of February, A. D. 1837.

W. H. HAYWOOD, *Clk.*

SUPREME COURT OF THE UNITED STATES.

No. 28.

HENRY TOLAND, PLAINTIFF IN ERROR,

VERSUS

HORATIO SPRAGUE.

ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE DISTRICT OF PENNSYLVANIA.

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Langtree and O'Sullivan, print.

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Langtree and O'Sullivan, print.

UNITED STATES, *District of Pennsylvania*, Sct:

The President of the United States, to the Judges of the Circuit Court of the United States, holden in and for the District of Pennsylvania, in the third circuit, greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you or some of you, between Henry Toland, a citizen of the State of Pennsylvania, plaintiff, and Horatio Sprague, a citizen of the State of Massachusetts, defendant, a manifest error has intervened, to the great damage of the said Henry Toland, as in his complaint has been stated, and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf,—You are hereby commanded that if judgment thereof be given, then under seal you do distinctly and openly send the record and process in the suit aforesaid with all things concerning them and this writ, so that you have the same before the Chief Justice and the Associate Justices of the Supreme Court of the United States, on the second Monday in January next, at the City of Washington, being the seat of National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Washington aforesaid, this day of in the year of our Lord one thousand eight hundred and thirty- and in the sixty-first year of the independence of the United States of America.

FRA. HOPKINSON, *Clk. Cirt. Ct.*

Allowed by Jos. Hopkinson, Dist. J. Jan. 12, 1837.

UNITED STATES, *District of Pennsylvania*, Sct:

To Horatio Sprague, a citizen of the State of Massachusetts:

Whereas, by a writ of error issuing out of the Supreme Court of the United States, directed to the Judges of the Circuit Court of the United States holden in and for the District of Pennsylvania, in the third circuit, wherein Henry Toland, a citizen of the State of Pennsylvania is plaintiff, is the complainant, the said judges are directed to send the record and process of a certain suit, with all things concerning them, so that the same may be had before the Chief Justice and Associate Justices of the Supreme Court of the United States, on the second Monday in January next, at the City of Washington, being the seat of National Government, in which suit the said Henry Toland is plaintiff, and you the said Horatio Sprague defendant, in an action of foreign attachment,—that the record and process aforesaid being inspected, they the said Supreme Court may cause to be done thereupon what of right ought to be done; and the said Henry Toland having made an assignment of errors, and given good and sufficient security that the plaintiff in error shall well and truly prosecute his said writ of error to effect, and answer all such costs as upon an affirmance of the judgment of the said Circuit Court may be adjudged to the respondent in error, you are hereby cited to appear (if you see cause) at the said Supreme Court, at the time and place aforesaid, to answer to the said writ of error, and the errors assigned by the said Henry Toland, plaintiff.

Given under my hand and seal this seventh day of January, in the year of our Lord one thousand eight hundred and thirty-seven, and in the sixty-first year of the independence of the United States of America.

JOS. HOPKINSON.

Served on T. W. Hubbell, Esq., as attorney for defendant. So answers B. S. BONSALL, *Ml.*

UNITED STATES, *District of Pennsylvania,* Sct:

Be it remembered that heretofore, to wit, on the fifth day of August, eighteen hundred and thirty-four, a precipe in writing was filed in the circuit court of the United States, in and for the district of Pennsylvania, in the third circuit, which said precipe is in the words and figures, and of the tenor following, that is to say: In the circuit court of the United States of America, in and for the eastern district of Pennsylvania.

HENRY TOLAND, *a citizen of the State Pennsylvania,* vs. HORATIO SPRAGUE, *a citizen of the State of Massachusetts.*	Foreign attachment case. Real debt, $2,440 70. Bail, $5,000.

Issue the above process to attach the goods, chattels, and property, of the defendant, in this district, and summon John Mc'Crea, Paul Lajus, and S. Broom, as garnishees.

H. D. GILPIN, Attorney for plaintiff.

August 5*th* 1834.

See exhibit A.

Afterwards, to wit, on the same day and year, the said Henry Toland, by his attorney H. D. Gilpin, prosecutes and sues forth out of the said court the writ of foreign attachment of the President of the United States, in the words following, to wit:

UNITED STATES, *District of Pennsylvania, ss:*

The President of the United States, to the Marshal of the [SEAL.] Eastern District of Pennsylvania, greeting:

We command you that you attach Horatio Sprague, a citizen of the State of Massachusetts, late of your district, by all and singular his goods and chattels, lands and tenements, in whose hands or possession soever the same shall be found in your district, so that he be and appear before the Judges of the Circuit Court of the United States, in and for the district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Philadelphia on the eleventh day of October next, to answer to Henry Toland, a citizen of the State of Pennsylvania, of a plea of trespass on the case, &c., and have you then there this writ.

Witness the honorable John Marshall, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourth day of August, A. D. eighteen hundred and thirty-four, and in the fifty-ninth year of the independence of the said United States.

ENDORSED, No. 5. Circuit Court, October 5, 1834.

HENRY TOLAND, *a citizen of the State of Pennsylvania,* vs. HORATIO SPRAGUE, *a citizen of the State of Massachusetts.*	Foreign attachment case. Bail $5,000.

Attach all goods, chattels and effects, rights and credits, of the defendant, in the hands of John Mc'Crea, Paul Lajus, and S. Broom, and summon them as garnishees.

H. D. GILPIN, for plaintiff.

On which said eleventh day of October, A. D. eighteen hundred and thirty-four, the day of the return of the said writ, the said marshal makes return thereof as follows, to wit: Served on John Mc'Crea, August 6th, 1834, at 16 minutes past 11 o'clock, A. M. Served on S. Brown and P. Lajus same day, at 3 minutes of 12 o'clock, M.

J. COX, Dep. Ml.

And thereupon afterwards, to wit, on the first day of November, eighteen hundred and thirty-four; on motion of F. W. Hubbell, Esq., attorney for the defendant, the court grant a rule to show cause why the attachment should not be quashed, with costs.

See exhibit B.

And thereupon afterwards, to wit, on the thirteenth day of December, in the same year, the said rule, &c. to show cause was discharged by the court.

And thereupon afterwards, to wit, on the eleventh day of April, eighteen hundred and thirty-six, on motion of plaintiff's attorney, the court grant a rule to show cause why the plaintiff should not have leave to amend his declaration by striking out the count, on "account stated."

And on the twentieth of the same month of April, on motion of the plaintiff's attorneys, the court grant a rule on the defendant, to show cause why the court should not make an order on the defendant, to produce on the trial of the cause, a letter from Charles Pellet to the defendant, dated December 18th, 1834, or judgment.

See exhibit C.

Afterwards, to wit, on the seventh day of May, of the same year, the plaintiff's rule of the 11th April, 1836, was made absolute, and leave to amend the declaration was granted by the court.

And on the ninth of the same month of May, the plaintiff's rule of the twentieth of April, 1836, was made absolute, and an order made pursuant thereto—nisi causa.

(*A.*)

In the Circuit Court of the United States of America, in and for the Eastern District of Pennsylvania.

Henry Toland, *a citizen of the State of Pennsylvania,*
vs.
Horatio Sprague, *a citizen of the State of Massachusetts.*
October Sess. 1834.
No. 5.

Henry Toland, the plaintiff above named, being duly sworn according to law, deposes and says:

That the defendant Horatio Sprague, a citizen of the State of Massachusetts, is now actually indebted to him the plaintiff in the sum of two thousand four hundred and forty dollars seventy-hundredths. That the said debt arises from the detention by the said defendant of the said sum of money, which he has actually received from the sale of five hundred mats of cassia, one hundred ten catty boxes of gunpowder tea, and two cases of crape dresses, the property of the plaintiff, and placed in the hands of the defendant to be sold for his account, including the interest due to the plaintiff up to the present time.

HENRY TOLAND.

Sworn and subscribed this 5th day of August, 1834, before me:

S. BADGER, *Aldm.*

(*B.*)

Henry Toland, *a citizen of the State of Pennsylvania,*
vs.
Horatio Sprague, *a citizen of the State of Massachusetts.*
Circt. C. U. S. For. Att.
Octr. S. 1834.

Henry Toland, the plaintiff above named, being sworn, says that Horatio Sprague, the defendant above named, is not now, and for a long time past has not been, an inhabitant of nor residing in the United States, but that for a long time, to wit, six years and more, has been settled and residing in and an inhabitant of Spain, being there largely engaged in business as a merchant and trader, and that the said Horatio has not, within the time stated above, been within the United States, nor is he now nor has he to the best of the affirmant's belief and knowledge, any intention of returning to the United States, and that the said Horatio is now, and for some time past has been, consul of the United States at Gibraltar, in Spain aforesaid.

HENRY TOLAND.

Sworn this 11th day of Nov. before me:

WILLIAM MILNOR, *Alderman.*

(C.)

Henry Toland, *a citizen of the State of Pennsylvania*, vs. **Horatio Sprague**, *a citizen of the State of Massachusetts.*	C. C. U. S. Octr. Sess. 1834.

Henry Toland, the plaintiff above named, being duly sworn, declares and says that a certain Charles Pettit wrote a letter to the defendant Horatio Sprague above named, bearing date the eighteenth day of December, A. D. 1824, and that the said Charles Pettit was at that time and date the factor of the plaintiff, having the care and disposition of certain merchandise belonging to the plaintiff, and did by that letter transfer the same to the care and agency of the defendant, and give him certain instructions in regard thereto, and that the said defendant did receive the said letter and merchandise, as appears by a letter from him the said defendant to the said plaintiff, dated October 24, 1825; and this affirmant declares that the said letter of December 18, 1824, is material to him on the trial of this cause, as he is advised and believes, and that the same is in the possession of the defendant, to the best of his knowledge and belief.

HENRY TOLAND.

Sworn and subscribed before me, this 11th day of April, '36.

WILLIAM MILNOR, *Aldm.*

In the Circuit Court of the United States in and for the District of Pennsylvania, in the third circuit.

Henry Toland, *a citizen of the State of Pennsylvania*, vs. **Horatio Sprague**, *a citizen of the State of Massachusetts.*	Of October Sess. 1834. No. 5.

Horatio Sprague, a citizen of the State of Massachusetts, was attached to answer Henry Toland, a citizen of the State of Pennsylvania, of a plea of trespass on the case, &c., and thereupon the said Henry, by Henry D. Gilpin, his attorney, complains for that whereas heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and thirty, at the district aforesaid, in consideration that the said Henry would deliver or cause to be delivered to the said Horatio divers goods, wares, and merchandise, of equal value, to wit, of the value of five thousand dollars lawful money, &c., to be sold and disposed of by the said Horatio, for the said Henry, for a reasonable reward or compensation, to be therefor paid by the said Henry to the said Horatio, he the said Horatio undertook, and then and there faithfully promised the said Henry to sell and dispose of the said goods, wares, and merchandise, for the said Henry, and to render a reasonable account thereof to the said Henry, and to pay him the proceeds of such sale whenever he the said Horatio should be thereunto afterwards requested. And the said Henry avers that he did deliver the said goods, wares, and merchandise, of equal value, to wit, of the value aforesaid, to the said Horatio, to wit, at the district aforesaid, on the day and year aforesaid, and that the said Horatio did then and there sell and dispose of the said goods, wares, and merchandise, for a large sum of money, to wit, the sum of five thousand dollars, and then and there received the said money for the same, yet the said Horatio not regarding his said promises and undertakings aforesaid, in that behalf made, but intending to deceive and defraud the said Henry, hath not as yet rendered a reasonable account or any other of the said goods, wares, and merchandise, or of any part thereof, or paid to the said Henry the said sum of five thousand dollars, or any part thereof, being the proceeds of such sale, although often requested to do so; but to do the same or any part thereof he the said Horatio has wholly neglected and refused, and still does.

And whereas also, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, the said Horatio was indebted to the said Henry in the further sum of five thousand dollars, like lawful money, for so much money by the said Horatio before that time had and received to the use of the said Henry, and being so indebted, he, the said Horatio, undertook and faithfully promised, in consideration thereof, on the day and year aforesaid, at the district aforesaid, the said Henry to pay him the said sum of five thousand dollars, when he should be thereunto afterwards requested.

And whereas also, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, the said Horatio accounted with the said Henry of and concerning divers sums of money from the said Horatio to the said Henry before then due and owing, and then unpaid and in arrear, and upon such accounting the said Horatio was then and there found to be in arrear and indebted to the said Henry in the further sum of five thousand dollars, lawful money, &c.: and being so found in arrear and indebted to the said Horatio, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said Henry to pay him the said sum of five thousand dollars, when he should be thereunto afterwards requested.

Nevertheless, the said Horatio, not regarding his said several promises, has not paid any part of any of the said sums of money to the said Henry, although often requested, but still refuses so to do, to the damage of the said Henry five thousand dollars, and therefore he brings his suit, &c.

And the said Horatio Sprague, by F. W. Hubbell and B. Gerhard, his attornies, comes and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said Henry Toland hath above thereof complained against him, and of this he puts himself upon the country, &c.

And for a further plea in his behalf, the said Horatio Sprague, by leave of the court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that he, the said Henry Toland, ought not to have or maintain his aforesaid action thereof against him, because, he says, that the said several supposed causes of action, in the said declaration mentioned, did not, nor did any or either of them accrue to the said Henry Toland at any time within six years next before the commencement of this suit, in manner and form as the said Henry Toland hath above hereof complained against him, the said Horatio Sprague; and this he, the said Horatio Sprague, is ready to verify, wherefore he prays judgment if the said Henry Toland ought to have or maintain his aforesaid action thereof against him, &c.

And the said Henry Toland, as to the plea of the said Horatio, by him first above pleaded, whereof he hath put himself on the country, doth the like; and the said Henry, as to the plea of the said Horatio, by him secondly above pleaded in bar, saith, that by reason of any thing in the said plea alleged, he, the said Henry, ought not to be barred from having or maintaining his action aforesaid against the said Horatio, because protesting that that plea and the matters therein contained are wholly insufficient in law to bar or preclude him, the said Henry, from having or maintaining his said action against the said Horatio; yet for replication in this behalf the said Henry saith, that he, the said Henry, at the time when the said several promises and undertakings, in the said declaration mentioned, were made, and before and since, was, and yet is, a merchant, to wit, at the district aforesaid, and that the said Horatio, at the same time, and before and since, was, and yet is, also a merchant, and was also at the same time the factor of him, the said Henry; and as such merchant and factor had the care and administration of the money, goods, wares, and merchandise, in the said declaration mentioned, of the said Henry, and he merchandised and made profit of for the said Henry, and to render a reasonable account to the said Henry, when he, the said Horatio should be thereunto afterwards required; and that the said money, in the said several promises and undertakings in the said declaration mentioned, became due and payable on trade had between the said Horatio and the said Henry as merchants and merchant and factor, and wholly concerned the trade of merchandise between him, the said Henry, as a merchant, and the said Horatio as a merchant and factor of him, the said Henry, to wit, at the district aforesaid; and the said Henry further says, that no account or accounts whatever of the said money, goods, and merchandise, in the said declaration mentioned, or any part thereof, was or were ever stated, settled, or adjusted, between him, the said Henry, and the said Horatio, and this the said Henry is ready to verify; wherefore, he prays judgment and his damages on occasion of the premises to be adjudged to him, &c. And the said Horatio Sprague saith, that by reason of any thing in the said replication alleged, the said Henry Toland ought not to have or maintain his aforesaid action against him, the said Horatio Sprague, because, he says, that the said Horatio Sprague was not the factor of the said Henry Toland, nor did the said money, in the said several supposed promises and undertakings in the said declaration mentioned, become due and payable in trade had between the said Horatio Sprague and the said Henry Toland as merchant and merchant and factor, in manner and form as the said Henry Toland has above, in his said replication, alleged, and of this the said Horatio Sprague puts himself upon the country, &c. And the said Henry Toland, as to the rejoinder of the said Horatio Sprague to the replication of the said Henry to the second plea of him, the said Horatio, whereof the said Horatio hath put himself upon the country, doth the like. Therefore, let a jury thereupon come before the said judges at Philadelphia aforesaid, on the eleventh day of April, A. D. one thousand eight hundred and thirty-six, by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid, then and there, &c. On which said eleventh day of April, 1836, came the parties aforesaid, by their attornies aforesaid, and further day is given to the parties aforesaid, until the eleventh day of October in the same year. Therefore, as before, let a jury thereupon come before the said judges, at Philadelphia aforesaid, on the said eleventh day of October, 1836, by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid, then and there, &c.

On which said eleventh day of October, one thousand eight hundred and thirty-six, came the parties aforesaid, by their attornies aforesaid; and now, in this same session, to wit, on the twenty-first day of November, in the year last aforesaid, the jurors of the jury aforesaid being called, likewise come, to-wit, James P. Becoley, John S. Riddle, Patrick Hayes, William McKee, Robert Ewing, Mason Hutchins, Mahlon Dungan, William Vogdes, William Redwood, Samuel Palmer, Lewis Waln, and William Stephens, who being duly empannelled, returned, chosen, tried, and sworn or affirmed, to speak the truth of the matter within contained, upon their oaths and affirmations aforesaid respectively do say, That they find for the defendant, under the direction of the court, with 6-000ths costs. Therefore, it is considered by the court here that the said Henry Toland take nothing by his writ aforesaid, but that he be in mercy, &c.; and that the said Horatio Sprague go thereof without day, &c.

And it is also considered by the court here that the said Horatio Sprague recover against the said Henry Toland the sum of eighty-seven dollars and thirty-five cents, by the court here to him adjudged, for his costs and charges, &c.

Afterwards, to wit, on the seventh day of January, A. D. one thousand eight hundred and thirty-seven, the said plaintiff files the annexed bill of exceptions.

UNITED STATES, *District of Pennsylvania*, Sct:

I certify the foregoing to be a true and faithful copy of the record and proceedings of the Circuit Court of the United States in and for the district of Pennsylvania, in the third circuit, in a certain action of trespass on the case therein lately depending between Henry Toland, plaintiff, and Horatio Sprague, defendant.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said Circuit Court, at Philadelphia, [SEAL.] this thirteenth day of January, A. D. 1837, and in the sixty-first year of the independence of the said United States.

FRA. HOPKINSON, *Clk. Circt. Ct.*

Be it remembered, that at the session of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, holden at the City of Philadelphia, for October, in the year of our Lord one thousand eight hundred and thirty-four, came Henry Toland, a citizen of the State of Pennsylvania, by Henry D. Gilpin, his attorney, into the said court, and impleaded a certain Horatio Sprague, a citizen of the State of Massachusetts, in a certain plea of trespass in the case, in which the said Henry declared against the said Horatio, Prout narr.

And the said Horatio pleaded to the said narr. Prout pleas.

And the said Henry replied to the said pleas, Prout replication.

And the said Horatio rejoined to the said replication, Prout rejoinder.

And thereupon issue was joined between the said Henry and the said Horatio; and afterwards, to wit, at the October session of the said court, holden at the said city, in and for the said district, in the year of our Lord one thousand eight hundred and thirty-six, before the honorable Henry Baldwin, one of the justices of the Supreme Court of the United States, and the honorable Joseph Hopkinson, the District Judge of the United States in and for the said district, on the twenty-first day of November, in the year of our Lord last aforesaid, came the said issue to be tried. And the said Henry and the said Horatio also came by their attornies, and the jury whose names are above recited impannelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn or affirmed to try the said issue. And upon the trial of the said issue, the counsel for the said Henry, in opening the case, stated that they claimed the sum of $1,579, the balance of an account between Sprague and Chs. Pettit, and to maintain and prove the said issue on his part, gave in evidence a certain letter from him the said Henry to a certain Charles Pettit, dated "Philadelphia, Sept. 25, 1824," and containing the following words and figures, addressed to Mr. Charles Pettit, supercargo of the ship William Penn:

Dear Sir: I have the pleasure to hand you enclosed invoice and bill of lading of sundry merchandise shipped by me to your consignment, by the ship Wm. Penn, West, master, bound for Gibraltar, amounting to $3,575 45.

The tobacco was selected by a Kentuckian of great experience, and judges here have pronounced it a very good article.

The gunpowder teas are of the very first quality, and contain 123 lbs. neat weight. At any thing less than $3 33 per box, I lose money; but they must be disposed of.

The cassia is of a very excellent quality—no better has arrived from Canton this year.

The Mandarin crape dresses are very elegant, and I make large calculations on their bringing me a good price. If you can get quicksilver in Gibraltar for 40 cents, you may return me the whole amount of the shipment in said article; and immediately on your arrival, if you cannot, please endeavor to procure me *good* bills on the United States on more favorable terms than shipping the Spanish dollars; and, if you cannot, you will please ship me the Spanish dollars by the first good vessel after your arrival, bound to New York or this port.

I would be particularly obliged by your informing me of the state of the market for teas, crape robes, crape shawls, and any thing else which may be likely to prove advantageous; and in case of your leaving there, I would take particular pleasure in directing a shipment to your friend Mr. Sprague."

And, further, three letters from the said Charles Pettit to the said Henry Toland, dated Gibraltar, Nov. 12, 1824, Dec. 8, 1824, and Dec. 18, 1824, viz:

GIBRALTAR, *November* 12, 1824.

DEAR SIR: I embrace this opportunity to announce my safe arrival at this port, on the 2d inst. after a passage of 36 days.

The intercourse between this and Algesiras by water being prohibited, and the immense quantity of all kinds of merchandise now here, makes business very dull, and prices low. I have not yet been able to dispose of any of your shipment, but am in hopes a few days will produce a favorable change; and you may rely upon hearing from me by an early opportunity. I annex you a price current, to which I beg to refer you for prices.

I am, truly and respectfully,
Your friend and servant,
(Signed) CHARLES PETTIT.
MR. HENRY TOLAND, *Philadelphia.*

GIBRALTAR, *Dec.* 8*th*, 1824.

DEAR SIR: Annexed you have duplicate of my last respects of the 12th Nov. I have since sold your eleven hhds. tobacco, per ship William Penn, at $6 1-8, nett proceeds, amounting to $530 17, which I shall remit to you by the first good opportunity for New York or Philadelphia. The tea and cassia I have not yet been able to dispose of. The crape dresses are also yet unsold; there are a good many here of an inferior quality, and at much lower prices. I am, however, in hopes yet to dispose of them to advantage, and I hope shortly. I beg to refer you to the annexed price current for prices; and hoping to have an early opportunity to forward you the proceeds of sales of tobacco, and one thousand dollars, either in dollars or bills on New York or Philadelphia,

I remain, truly and respectfully,
Your friend and servant,
(Signed) CHARLES PETTIT.
HENRY TOLAND, Esq., *Philada.*

GIBRALTAR, *December* 18*th*, 1824.

DEAR SIR: With this you have duplicate of my last respects of the 8th December.

I have now the pleasure of enclosing you acct. of sales of eleven hhds. tobacco, amounting to $530 17—and, also, the 2d of a bill drawn by Horatio Sprague, in my favor, on Isaac Green Pearson, 568

Esq., New York, at sixty days' sight, for $530 17, No. 1366; also, a bill for $1,000, No. 1367, drawn by the same, in favor of the same, on the same: the latter, when in order, you will be pleased to consider as an advance on your shipments. I also enclose you landing certificates of the tea, cassia, &c.

The communication by water, between this and Algesiras, still continues to be prohibited.

I shall sail from this to-morrow, in the ship William Penn, for Savannah, and have left the following instructions with my friend, Mr. Sprague, regarding your property left by me in his hands:

"With respect to the gunpowder tea, cassia, and crape dresses, shipped by Henry Toland, you will please to dispose of them as you may think most for the interest of the shipper, and remit the amount to him, in bills on the United States, forwarding me acct. of sales of the same."

I hope to have the pleasure of seeing you by the middle of March.

I remain, truly and sincerely,
Your friend and servant,
(Signed) CHARLES PETTIT.

HENRY TOLAND, Esq. *Philada.*

GIBRALTAR, *December* 18, 1824.

DEAR SIR: With this, you have duplicates of my last respects, of the 8th December. I have now the pleasure of enclosing you acct. sales of eleven hhds. tobacco, amounting to $530 17; and also the second, of a bill drawn by Horatio Sprague in my favor, on Isaac Green Pearson, Esq. New York, at 60 days' sight, for $530 17, No. 1366. Also: a bill for $1000, No. 1367, drawn by the same in favor of the same, on the same—the latter, when in order, you will be pleased to consider as an advance on your shipment. I also enclose you landing certificates of the tea, cassia, &c.

The communication by water, between this and Algesiras still continues to be prohibited.

I shall sail from this to-morrow, in the ship William Penn, for Savannah, and have left the following instructions with my friend, Mr. Sprague, regarding your property left by me in his hands.

"With respect to the gunpowder tea, cassia, and crape dresses, shipped by Henry Toland, you will please to dispose of them as you may think most for the interest of the shipper, and remit the amount to him in bills on the United States, forwarding me acct. of sales of the same.

I hope to have the pleasure of seeing you by the middle of March, and remain, &c.

And further, a certain other letter from the said Charles Pettit to the said Henry Toland, dated Charleston, February 28, 1825, viz:

CHARLESTON, *February* 28, 1825.

MR. HENRY TOLAND, *Philadelphia:*

SIR: I yesterday received your letter of the 15th February. The contents, I confess, surprised me. I have adopted the only plan which appeared to me necessary on this occasion at present, which was, to refer to my letter and sales book. I now enclose you copies of three different letters, viz: Nov. 12, 1824, Dec. 8, and Dec. 18, and also copy of acct. sales, enclosed in a letter, also, landing certificates of tea, cassia, &c. To guard against accidents, I brought with me the first of the two bills mentioned in my letter of the 18th December; and to save time, and to serve in case of need, had them sent on to New York, to be presented for acceptance, a few days after my arrival in Savannah. If you will have the goodness to write to Messrs. Foster & Girard, New York, you will receive them, viz: one for $1,000, No. 1367, one for $530 17, No. 1366. The remarks in the concluding part of your letter, and the candor with which they were expressed, I shall not, at this time, comment upon.

I am, your obedient servant,
(Signed,) CH. PETTIT.

And, further, a certain letter from the said Charles Pettit to the said Horatio Sprague, dated Gibraltar, December 18, 1824.

GIBRALTAR, *December* 18, 1824.

HORATIO SPRAGUE, Esq., *Gibraltar:*

MY DEAR SIR: By your account current rendered this day, a balance stands against me of $5,574 3 1, to meet which you have in your possession 550 bbls. superfine flour, on my account entire, my half interest of 372 barrels flour, an invoice of crapes, &c., amounting to $2,020, 100 ten-catty-boxes gunpowder tea, 500 bundles cassia, and 2 cases super satin Mandarin crape dresses, containing 101 dresses.

With regard to the flour, I have to request that you will send on an advance of three-fourths the probable amount *immediately*, and the balance when sold to Messrs. Bainbridge & Brown, to be passed to the credit of Messrs. Eyre & Massey, of Philadelphia.

With regard to the Caraccas cocoa, I enclose you Mr. Archer and Mr. Hollingsworth's letter to me on the subject, and refer you to my former letter respecting the disposition of the funds arising therefrom.

As to the crape dresses, shipped by and belonging to Messrs. Jones, Backford, and company, their instructions are, to sell if they will realise costs and charges, and remit the amount to Messrs. Wm. and James Brown & Co., Liverpool, to their credit.

With respect to the gunpowder tea, cassia, and crape dresses, shipped by H. Toland, you will be pleased to dispose of them as you may think most for the interest of the shipper, and remit the amount to him in a bill on the United States, forwarding me acct. sales of the same.

I should be *particularly obliged* by having an advance of £500 sterling sent on to-morrow by mail to Messrs. Bainbridge & Brown, London, to be passed to the credit of Messrs. Eyre & Massey, of Philadelphia.

With my best wishes for your health and happiness,

I am, your sincere friend,
(Signed,) CH. PETTIT.

And, further, two certain letters from the said Henry to the said Horatio, of the first whereof, dated Philadelphia, January 6, 1825, this is an extract:

"I am expecting soon to hear the result of my shipment by the William Penn," and hoping it may be favorable, I am, &c.

And the second whereof, dated Philadelphia, February 22, 1825, is as follows, viz:

"PHILADELPHIA, *February* 22, 1825.

"MR. HORATIO SPRAGUE, *Gibraltar:*

"DEAR SIR: By the ship William Penn I consigned to Mr. Charles Pettit 100 boxes gunpowder tea, a quantity of cassia, 11 hhds. Kentucky tobacco, and 2 cases Mandarin robes. I directed Mr. Pettit to make the returns of this shipment *immediately* on his arrival at Gibraltar, as follows: If quicksilver could be had at 40 cents, then the whole amount in said article; if not, to ship the whole amount in dollars, by the *first vessel* for this port or New York; or, if good bills of the United States could be had on more favorable terms for a remittance, then to make the return in bills. Mr. Pettit promised a strict compliance with all these things, but since the sailing of the William Penn from this port I have never received a line from him. I have heard of his arrival in Savannah, and of his proceeding to Charleston, but I have not yet been favored with a single letter from him.

"As my property may be left in your hands by him, unsold, I beg of you to follow the directions given to him, as herein detailed, and make the remittance direct to me. I have particularly to beg your attention to this matter, and to remit as early as possible.

"I enclose you a letter to Dr. F. Rudolph, Cadiz, which please forward by a private conveyance, if one offers, otherwise put it in the post. I would be particularly obliged by information as to your market for young hyson tea, and how many chests and half chests could be conveniently sold there, and at what price.

"I am, very respectfully,"

And further, this letter from the said Horatio to the said Henry, dated Gibraltar, January 18, 1825:

HENRY TOLAND, Esq., *Philadelphia:*

"DEAR SIR: Our mutual friend, Mr. Charles Pettit, left this on 19th ult., previous to which he placed in my hands for sale for your account, an invoice of gunpowder tea, cassia, and crape dresses, with directions to dispose of them as I may judge most for your interest, which shall have my best attention. With the crape dresses I have as yet done nothing; there is but little or no inquiry for them. Of the cassia, I have placed 40 mats only at 30 cents per pound; our existencies of this article are very considerable. Of the tea, I have placed 64 ten-catty boxes at 11 reals and 4 quarts per pound, and hope to get the remainder off at the same price."

And further, three letters from the said Horatio to the said Henry, dated Gibraltar, May 3, 1825.

"Henry Toland, Esq., *Philadelphia:*

Dear Sir: Your very valued favors of January 6, 22 February, 15 and 24 March, came duly to hand.

"For the remainder of your gunpowder tea I have just refused 10 reals and 4 quarts per pound, but would accept 10 8, as I see no prospect of doing better. I have sold no more of your cassia, the best offer being 27 cents per pound; and your crape dresses remain without inquiry. I have shown them several times to our dealers, but as the supplies from the United States and England have recently been so steady, they will not make a fair offer for them. I beg you will be assured that I shall not lose sight of your interest, and endeavor to get them off soon, either in barter for quicksilver or opium, or otherwise, although I do not feel authorized to do so for the former, it having experienced so great an advance."

Gibraltar, *May* 24, 1825.

"Our dealers talk of about $7 for your Mandarin dresses. I shall endeavor to get them up to the invoice price of them, and hope, with a little delay, to succeed."

Gibraltar, *June* 7, 1825.

"Your Mandarin dresses, and a few mats of cassia, remaining unsold, prevents my making up account of your shipment by Mr. Pettit."

And further, this letter, from the said Horatio to the said Henry, dated Gibraltar, July 4, 1825:

"I have closed the sales of the crapes and cassia, left with me by Mr. Pettit some time since, and settled his account."

And further, this letter from the said Henry to the said Horatio, dated Philadelphia, September 12, 1825:

Philadelphia, *September* 12, 1825.

Dear Sir: I have received your esteemed letters of 3d and 26th May, 20th June, and 4th July. In your first recited letter you acknowledge receipt of mine of 6th January, 22d February, 15th and 24th March; and to my letters of 6th January and 22d February, and 15th March, I beg leave particularly to refer you, well assured that an entire forgetfulness of these dictated your letter to me of 4th July.

Mr. Charles Pettit arrived here some days since in the Ruth & Mary. A few days afterwards he handed me your account sales of my goods, dated Gibraltar, June 30, 1825; nett proceeds $2,579 11-13. He informed me that he had been very unfortunate in his business, &c., &c.; and that he had lost all his property, &c., &c., for which I am very sorry, as well on his own account, as on account of those to whom he may be indebted. I remarked to him that I should of course apply to you for the payment of the sales of my goods sold by you; and in reference to my letter of February 22, you will see I direct you particularly to sell my property, and remit the proceeds direct to me. This request to sell and invest the proceeds in quicksilver or opium, is repeated in my letter of 15th March, and I have never changed this order, or authorized you to do other than remit *to me direct*. Your letters acknowledge receipt of mine, giving you these orders, and you advise therein, from time to time, sales of my tea and cassia. In your letter of *June 20th* you say, "that you have done nothing with my crape dresses;" and in that of 4th July you say, "I have closed the sales of the crapes and cassia, left with me by Mr. Pettit *some time since*, and settled his account."

You use the expression *some time since*, and if you will observe, there was only a lapse of 14 days.

I now have to request that you will remit to me the nett proceeds of the sales of my cassia, tea, and crape dresses, amounting to $2,579 11-13, first deducting your bill of exchange for $1,000, dated Gibraltar, December 18, 1824, on J. G. Pearson, of New York, at 60 days, drawn in favor of Mr. Charles Pettit, and also the commission of Mr. Pettit.

I beg leave to hand you an extract from Mr. Pettit's letter to me, of December 18, 1824, on leaving Gibraltar.

I shall sail from this to-morrow, in the ship William Penn, for Savannah, and have left the following instructions with my friend, Mr. Sprague, regarding your property left by me in his hands:

"With respect to the gunpowder tea, cassia, and crape dresses, shipped by Henry Toland, you will be pleased to dispose of them as you may think most for the interest of the shipper, and remit the amount to him, in bills on the United States, forwarding to me account sales of the same."

I am satisfied that on receipt of this letter you will hasten to remit me the amount due me on these sales, with interest.

I am sorry that you should lose money by Mr. Pettit, or by any other; but certainly you neither can, nor can wish, to apply my money to the diminution of your loss.

I do not intend that this business shall for a moment interrupt my correspondence with you, and I expected, by this opportunity, (the brig Newcastle) to ship you a quantity of teas, which I shall do by a vessel to be despatched in a few days.

MR. HORATIO SPRAGUE, *Gibraltar*.

And further, this letter, from the said Horatio to the said Henry, dated Gibraltar, October 24, 1825:

GIBRALTAR, *October* 24, 1825.

DEAR SIR: I have just received your letter of 12th September, which I hasten to reply to. It would appear by your letter that Mr. Pettit's agency here was not so full as his own instructions to me gave me to expect. The property which he has brought and consigned to me at various times, has ever been delivered over to me with invoices, in his own name, and I have ever been punctilious in following his instructions, sometimes in remitting to one, sometimes to another, and on which property I was always ready, and at various times did advance sums of money; but how he, Mr. Pettit, appropriated this money, it was not my province to inquire; he might have remitted it to you, or any one else. Here follows the other part of his instructions of the date of the 18th December, which you appear to have overlooked, but which must establish in your mind the nature of Mr. Pettit's transactions here. Had you have consigned your property to me, instead of Mr. Pettit, I should then have been accountable to you; but it cannot be expected that I am to guarantee the conduct of your agent, who always is accountable to you for his conduct. Here follows the extract of his order of 18th December, 1824: "By your account current, rendered this day, a balance stands against me of $5,574 3 1, to meet which, you have in your possession 550 barrels of superfine flour, on my account entire, my half interest of 372 barrels of flour, and invoice of crapes, &c., amounting to $2,020, 100 ten-catty boxes gunpowder tea, 500 bundles cassia, and two cases superior satin Mandarin crape dresses, containing 101 dresses," &c., &c.

This paragraph, I repeat, cannot but convince you that all my advances to Mr. Pettit were in the various property which he placed in my hands for sale. It is very true I corresponded with your good self on the subject of the articles which you entrusted to the management of Mr. Pettit; and it is no less true I did the same with him, and from time to time promised him account, which I never did to you; and, until his last visit to this, did not close the sales of the articles, when, at his particular request, closed every account before he left this. This explanation, I trust, will prove satisfactory, so much so, that I may continue to enjoy your confidence.

I had forgot to remark your punctuation of a paragraph of my respects of 4th July. The goods in question had been left with me a long time since, but were sold between 20th June and 4th July; not that they had been sold a long time since, as you would appear to wish to construe the thing. I had the pleasure to address you under date of 22d, with a few prices, in which I have no alteration to note. I am obliged by your promised consignment of teas; on arrival you may be assured that I shall attend to your interest in the disposal of them.

HENRY TOLAND, Esq. *Philada.*

And further, this letter from the said Henry to the said Horatio, dated January 4, 1826:

PHILADELPHIA, *January* 4, 1826.

DEAR SIR: I have received your esteemed letters of 24th October, 2d and 15th November. I regret to find that on perusal of your letter of 24th October, that we do not think alike on the subject of the balance claimed by me as due from you for sales of my property left in your hands for my account by Mr. C. Petit. On looking more particularly into your correspondence, I find your letter of 18th January last, to which I beg leave to refer you, and hope it will be sufficient to induce you to settle the matter without further difficulty; but if on perusal of it and a revision of the whole matter, you do not arrive at that result in your own mind, I would then propose to submit the matter to reference.

I therefore beg that you will nominate any friend in Philadelphia, and I will choose another, and the two may fix on a third, and after submitting the whole controversy to them, I will cheerfully abide by their decision.

I am sure from your character of uprightness in all your transactions, that you will hasten to accede to this proposition. I will only add on this point that it will be very satisfactory to me that this matter should be settled with as little delay as possible.

Your letter of November 15 advises me of the safe arrival of the Tontine, and the prospect for the teas, and that you would in conseqence of the failure of Mr. S. Williams, await my further directions as to the remittance of the proceeds. I hope they are sold advantageously, and that those by the Adams have also arrived in safety, and have met a pretty good market. You will please, immediately on receipt of this, remit to Messrs. James W. Alston & Co., of Glasgow, £750 sterling to be passed by them to the credit of George W. Dun & Co., of Philadelphia, and your attention to this will much oblige me. I do expect that by the time this reaches you all the teas will be sold, and that the amount will exceed this sum; and if it does not, you will then remit the nett proceeds. Any balance that may remain after remitting the above named £750 sterling you will please ship to me in lead, quicksilver, or opium, whichever you may consider the most advantageous. And if you determine to pay the balance, which I consider as due from you, you can invest it in either of the above articles, always preferring a vessel direct to this place. I am very sorry that any dispute should have arisen between us, but I hope the mode pointed out for its adjustment will be embraced by you, and it will then be speedily decided in your favor or mine.

Horatio Sprague, Esq., *Gibraltar*.

And, further, this letter from the said Horatio to the said Henry, dated Gibraltar, February 10, 1826:

Gibraltar, *February* 10, 1826.

Dear Sir: I am this moment in receipt of your letter of 4th ultimo, per Charles, and from your reference to my letter of 18th January, 1825, have looked into the same. That I was aware the property handed over to me by Mr. Petit did not belong to himself there is no question, but on what terms you and others consigned it to him it was not for me to inquire. On his arrival he submitted to me invoices of several shipments, required advances, and gave orders for sales; and, on his leaving this, as you may suppose, directed me to correspond with the different shippers by him, which, in my opinion, was very proper, and could not in the faintest degree lessen my claim to the property, on which I had made liberal, yes, more than liberal advances; so much so that Mr. Petit is over $2,000 my debtor; yet so particularly desirous am I to satisfy your mind, as I am in possession of all the original papers, letters, &c. connected with the business, I have no hesitation in submitting the question to any two respectable merchants here, one to be appointed by you, the other by myself, and to their decision I shall most readily subscribe; or if you are willing to leave the business to me, I will submit *every* paper to two disinterested merchants, and they shall address you on the subject, and the affair shall be settled to our satisfaction.

Herewith duplicate of my respects of 28th ultimo, since which I have delivered a part of your hyson skin tea at three and a half rials per pound. This parcel has been sold off, and if no complaints of its quality be made hereafter, I shall be glad.

Most respectfully, your humble servant,

HORATIO SPRAGUE.

HENRY TOLAND, Esq.

And, further, certain account sales, being as follows:

Sales of merchandise received 3d November, 1824, *ex ship William Penn, William West master, from Philadelphia, by order of Mr. Charles Pettit, for account and risk of the concerned, per Horatio Sprague, Gibraltar.*

GIBRALTAR, *June* 30, 1825.

Date.	Mats cassia.	10-catty boxes gunpowder tea.	Cases crape dresses.	Purchasers, quantity, &c.	Price.	Amount.	
1825. Jan. 13	40	–	–	Andrea Ferrari, at 3 mo. credit, neat weight, 261 1-2 lbs. . .	Rvn. 6	–	$78 5 7
May 6	–	64	–	Sundries, at do. nt. wt. 832 lbs. .	rs. 11 4	$780 0 0	
June 7	–	23	–	Do. do. 299 " .	10 8	261 7 8	
Do.	–	13	–	Do. do. 169 " .	11	154 11 0	
							1,196 6 8
June 30	460	–	–	Abraham Benbunan, 2,668 lbs.	Rvn. 5 1-2	733 8 6	
Do.	–	–	2	Sundries, containing 101 crape dresses	$8½ e'h	858 6 0	
	500	100	2				1,592 2 6
							$2,867 2 5

CHARGES.

	$	
Freight and primage, as per bill of lading . . .	84 10 1	
Lighterage and landing, $3 6; debenture certificates, $4 .	7 6	
Cartage to store	3 10 8	
Labor, receiving, weighing, and delivering . . .	3 7 12	
Warehouse room	16 6	
Guarantee, at a half per cent per month . . .	43 0 1	
Interest 3 months on $2,788 8-14, at 6 per cent. per annum .	41 9 15	
Brokerage, a half per cent.	14 4 1	
Commission, 2 and a half per cent.	71 8 2	
		287 2 8
		2579 11 13

Errors excepted. (Signed,) HORATIO SPRAGUE.

And further, a certain account current, being as follows:

Mr Charles Pettit in account current with Horatio Sprague.

GIBRALTAR, *July* 6, 1825.

1825.	Dr.						
June 24.	To balance due me this date per extract furnished				$7,384	10	00
1825.	Cr.						
June 30.	By proceeds sales 100 bales tobacco, per Adrian, as per account current rendered present date	$421	3	12			
	Ditto, cassia, crape goods, and tea, per Wm. Penn, as per ditto	2,579	11	13			
	Ditto, 11 cases crape goods, idem	1,889	2	2			
					4,890	5	11
July 2.	Cash received this date				1,088	0	0
4.	Balance in my favor to your debit in new account				1,406	4	5
					7,384	10	0
4.	To balance due me brought down				1,406	4	5

Errors excepted. HORATIO SPRAGUE.

And the said Horatio to maintain the issue on his part, gave in evidence the deposition of a certain Robert Metcalf, taken at Gibraltar, by virtue of a certain commission, issued from the said circuit court to certain commissioners, to take the depositions of such witnesses for the defendant as should be produced on the part of said defendant, Prout said commission.

And, also, an account attached to said commission, Prout said account.

And further, certain letters from the said Horatio to the said Henry, viz:

GIBRALTAR, 10*th May*, 1827.

DEAR SIR: In compliance with your directions under date of 22d February, I have delivered over to Messrs. Henry & M'Call, as per receipt herewith, the remainder of your teas and balance of account, in the sum of $375 02; and you will please receive herewith, duplicate account of sales and account current, the original of which having been delivered to Messrs. Henry and McCall. The 18 chests hyson skin tea, to Mr. Matland, 9th February, 1826, $325 6 0 is still outstanding. Mr. M. continues as he has, for these 12 months, locked up in his house, and, as yet, has made no exhibition of his affairs to his creditors. I shall assist Messrs. Henry and McCall all in my power, to recover for you this debt. Reverting to former transactions with Mr. Pettit, I thought enough had already been said. If Messrs. Henry & McCall have done me justice, they cannot have omitted mentioning to you my great desire to have the subject-matter of dispute legally decided; but through fear they may, from sinister motives, have been remiss in this important particular, I now challenge you to send out your power of attorney, and let that justice which you so boldly threaten to compel me to, take its course. Conscious innocence defies all threat.

I have lost your business, which is but of little importance to me; but I will not suffer your abuse.

Your obliged, humble servant,

HORATIO SPRAGUE.

PHILADELPHIA, *February 22d*, 1827.

SIR: I have, under this date, drawn an order in favor of Messrs. Henry & McCall, directed to you, requesting you to deliver over to said gentlemen, any teas which might remain unsold in your hands, and have requested them to pay you any charges, &c. you may have on them. My intentions were, that the proceeds of this shipment should go to London, to T. Wiggins, Esq., and I shall so direct Messrs. Henry & McCall. My object in the present step is, to take out of your hands such of my property as you may be willing to give up, and to assure you of my determination of compelling you to justice, as it relates to that part of it which you pretend belongs to Mr. Charles Pettit.

I am, yours, &c.,

HENRY TOLAND.

MR. HORATIO SPRAGUE, *Gibraltar*.

GIBRALTAR, 15*th June*, 1826.

DEAR SIR: The foregoing is copy of my respects of 10th ult. since which, from the cause therein urged, I have not placed any more of your teas; not being willing to sell at so great a sacrifice as evidently would be the case, to force sales at this moment of abundance. I am in receipt of your letter of 21st April, and on the subject of which Messrs. Henry & McCall have, no doubt, corresponded with you.

Very respectfully, yours, &c.,

HORATIO SPRAGUE.

GIBRALTAR, 24*th December*, 1825.

DEAR SIR: The foregoing is copy of my last respects of 15th ult. I have since had the pleasure to receive your esteemed of 4th ult. per brig Adams, with a further invoice of teas. Your invoice per Tontine, I have placed—hyson skin, at 3rs. and 4 quarts per lb., hyson at 9rs. per lb., young hyson at 4 reals and 4 quarts per lb., 4 months' credit. The weight falls short considerable from your invoice, as it is sold here by the custom-house black marks. Of your invoice per Adams, I have placed the hyson at 9rs. and eight quarts per lb.; but it has been turned upon my hands, it being of a very inferior quality; the scent is good, but the colour bad; and it is very weak. I have opened several boxes, supposing it might not be all the same; but there is no difference. I enclose certificate of the landing of both parcels of tea; and shall, by next occasion, wait upon you with account sales of that per "Tontine," and endeavor to get off that per "Adams." Sugars continue to be wanted; Havana white at 12 1-2, *a* $13 per cwt. brown $9 5-8 *a* $10 per cwt. Guatamala indigo scarce and saleable, at $2 *a* $2 1-4 per lb. Flour abundant and dull, at 5 *a* $6 per bbl.

London 50 1-4 per $.
Dollars, 2 per cent. prem.

I am, dear sir,
Your obedt. servant,
HORATIO SPRAGUE.

Gibraltar, 15*th November*, 1825.

Dear Sir: Confirming my respects of 2d inst. by this occasion, I have now the pleasure to acknowledge receipt of your esteemed favors of 1st ult. per brig "Tontine," arrived this morning, covering invoice and bill lading of teas to my consignment per said vessel, with instructions to dispose of the same at the best market price, and remit the proceeds to Samuel Williams, Esq., London. The disposal of the consignment shall have my best attention, though as to the remittance of the proceeds I shall wait your further instructions, having learnt with much regret by yesterday's mail the failure of Mr. Williams. I am in no way implicated thereby, and most sincerely hope you can say the same of yourself. I have also the favor of 3d ult. with an enclosure for Cadiz, which shall forward in such a way that there can be no doubt of its reaching its proper destination. Young hyson tea is quite unsaleable at this moment. The hyson I hope to place at something over 75 c. p. lb. The hyson skin will I fear not command the invoice price. Certificate of the landing of these teas shall be forwarded to you in course. Sugars continue in good demand at my last quotations. I have just placed 3,700 weight pepper per Charles from Sumatra, at 9 c. p. lb. nett proceeds in cash. Buenos Ayres hides have advanced; 3,500 have just changed hands at $19¾ p. cwt. Kentucky tobacco $9 a 9½ p. cwt. London $51¼*d*. Dollars 1½ per ct.

I remain yours, &c.
HORATIO SPRAGUE.

Philadelphia, *Octr*. 1, 1825.

H. Sprague, Esq. *Gibraltar:*

Dear Sir: Annexed is copy of my respects under date of 12th Septr. to which I crave your particular reference.

I have forborne to speak of the transactions, as I am assured you will change your opinion and remit me the amount due to me from you.

I now have the pleasure to enclose you invoice and bill of lading of 36 ch. H. skin, 23 ch. Y. hyson, and 30 chests hyson teas, which I wish you to dispose of immediately on receipt thereof, and at the best prices your market will afford. No. 3 and 10 are perhaps the best of the hyson skin teas. The young hysons are generally similar; and the hysons are as good as any that have gone to your market at any time. Please on receipt of this remit to S. Williams, Esq., London, as near the amount of this shipment as possible, say five or six hundred pounds sterling, to be carried to my credit with him; and also remit the amount due me from my consignment per William Penn, if you determine to pay it without further difficulty.

I expect to make you a further shipment in a few days, and therefore beg that you will close this so soon as received, unless there is a considerable loss. Please forward me certificate of landing, and

Believe me, very respectfully,
HENRY TOLAND.

P. S. The whole of the teas are of very good quality, but the hysons are particularly fine. H. T.

And the said defendant further to maintain the issue on his part, gave in evidence the following bill of exchange:

GIBRALTAR, 18 Dec. 1824. For 1000 dollars.—At sixty days sight please pay this first of exchange—second and third of same tenor and date not paid—to the order of Mr. CHARLES PETTIT, one thousand dollars.

Value in acct., &c.—which place to account as advised.
(Signed) HORATIO SPRAGUE.
To ISAAC GREEN PEARSON, Esq., *New York.*

1367. NEW YORK, Feb. 22, '25. Accepted.
(Signed) J. GREEN PEARSON.
Indorsed—CHS. PETTIT,
HENRY TOLAND.

Pay Mr. ROBINSON cash or order.
J. ANDREWS, *Act. Clerk.*

And the said defendant further gave in evidence (the same being produced upon notice so to produce from the possession of plaintiff,) certain four accounts, as follows:

Sales of 42 hogsheads of tobacco received, per Brig Mary, John Campbell master, from Philadelphia, by order of Mr. Charles Pettit, supercargo, for account and risk of Messrs. C. Price and Morgan, and Perit and Cabot, of Philadelphia aforesaid, per Horatio Sprague, Gibraltar.

1822.

Oct. 9. 22 hhds. and sundries, by amt. cash, 12 prox., viz: 1 hhd. gross, 10 2 6

Tare 10 p. c. 1 0 6 nt. wt.

	Cwt.	qr.	lbs.	Per cwt.		
	9	2	0	$5 11 0	$56 2 8	
1 do. -	9	0	24	4 9 0	43 9 4	
1 do. -	10	0	21	4 4 8	44 6 14	
1 do. -	9	2	1	5 8 8	47 11 5	
1 do. -	9	1	1	5 9 0	53 2 14	
1 do. -	9	0	21	4 9 0	43 9 4	
1 do. -	10	3	20	5 5 8	59 8 0	
2 do. -	19	1	9	5 0 1	96 6 12	
1 do. -	9	0	13	5 6 0	53 2 2	
1 do. -	13	1	25	5 2 8	70 2 2	
1 do. -	9	0	13	5 4 8	54 3 13	
1 do. -	9	0	2	5 6 8	49 11 11	
1 do. -	11	1	18	5 7 8	58 6 12	
1 do. -	8	2	16	5 7 0	48 3 2	
1 do. -	8	2	0	5 8 0	48 2 0	
1 do. -	9	0	19	5 3 8	48 6 5	
1 do. -	9	0	4	4 4 0	39 1 14	
1 do. -	9	1	8	5 2 8	48 6 10	
1 do. -	10	0	2	6 4 0	63 5 6	
1 do. -	9	3	21	6 0 0	59 7 8	
1 do. -	9	1	26	4 6 8	43 0 12	
						$1,130 8 14
Octr. 14. 20 hhds. 1 p. ct.						
17 prox. -	8	2	19	6 5 0	55 7 9	
Tare 1 per ct. -	6	0	26	–	39 11 15	
1 do. -	8	1	15	6 8 8	56 2 14	
1 do. -	11	0	1	6 7 0	72 5 12	
1 do. -	11	0	27	5 6 8	62 3 9	
1 do. -	12	0	17	5 3 8	63 9 9	
1 do. -	12	0	17	3 10 0	46 7 0	
1 do. -	9	0	4	5 2 8	47 0 12	
1 do. -	10	0	18	5 8 8	58 0 1	
1 do. -	8	0	3	5 9 8	47 10 0	
1 do. -	10	0	24	5 0 0	51 0 15	
1 do. -	9	2	14	4 10 0	46 6 4	
1 do. -	9	1	23	5 9 0	54 4 7	
1 do. -	8	3	3	–	50 5 10	
1 do. -	8	2	19	5 2 0	49 9 9	
1 do. -	9	1	25	5 9 0	54 5 11	
1 do. -	8	3	1	5 2 0	45 3 1	

STATEMENT—Continued.

1822.	Cwt. qr. lbs	Per cwt.		
Oct. 9. Tare 1 per ct.	8 1 25	$5 2 8	$44 1 10	
1 do.	10 2 20	5 9 0	61 5 14	
1 do.	9 1 26	5 0 0	47 4 15	
				1,949 11 1
42 hhds. total nt. wt.	403 1 14			
				2,180 7 15
CHARGES.				
Premium on freight, payable in silver, $1,396 50, at 1 per cent. as credited in account with Charles Pettit - -			13 11 10	
Cartage from store to auction mart - -			21 0 0	
Cooperage, inspecting at auction, $21; labor, 7 10-8 - - - - - -			29 7 8	
Guarantee, 1, md. at 00-20 per month -			10 10 13	
Interest, do. do do. -			10 10 13	
Auction dues, 2 1-2 per cent. - -			54 6 3	
Commisson, do. do. - -			54 6 3	
				195 5 2
Nett proceeds - - - - -			–	1,985 2 13
2-3 Cr. of Charles Pettit in acct. -			1,323 5 14	
1-3 do. Perit & Cabot -			661 8 15	
				$1,98 52 13

Errors excepted.
GIBRALTAR, *October* 31, 1822. HORATIO SPRAGUE.

Dr.

Charles Pettit, Esq., of Philadelphia, in account current with Horitio Sprague.

1822.			
Sep. 12	To cash paid you this date, -	-	$10 0 00
" 18	To cash paid you this date, -	$208 0 0	
" 18	To my letter of credit on William Day, Philadelphia, favor of T. M. Pettit for -	500 0 0	
			708 0 00
" 23	To cash paid you this date, -	-	48 0 00
" 27	To cash paid you this date, -	-	52 0 00
" 30	To cash paid you this date, -	-	90 0 00
Oct. 2	To my draft of this date on Perit & Cabot, of Philadelphia, favor Sperry & Stansberry, at 6 days' sight, $2,889 52, - - - -	2,889 6 4	
" 2	To interest on sales of romals, per contra, eighty days, at six per cent. per annum, -	39 7 8	
			2,929 1 12
" 7	To amount invoice of fruit shipped this date per Mary, Campbell, master, for Philadelphia, - - - - -	-	4,120 0 14
" 7	To cash paid you this date, -	-	100
			$8,037 2 10
" 7	To balance brought down, -	-	$149 1 06
" 8	To cash paid Captain Campbell, as per your order, Spanish milled dollars, $1,781, *a* 1 per cent, - - - -	-	1,798 7 12
			$1,947 9 02
" 8	To balance due me as per contra, - - - - - -	-	$1,947 9 02

Cr.

1822.			
Sep. 28	By proceeds sales of 6 cases romals, ex brig Mary, as per account rendered, - -	-	$3,012 11 02
Oct. 3	By proceeds sales of 23 hhds. tobacco, as per account rendered, - - - -	$761 5 09	
" 3	To freight and primage on same, - - - -	241 6 00	
			1,002 11 09
" 7	To proceeds sales of 133 hhds. tobacco, ex brig Mary, as per account furnished, -	3,314 0 12	
" 7	To two-thirds thereof, - -	-	2,227 4 08
" 7	To freight and primage on same, - - - -	1,396 6 00	
" 7	To freight on tobacco, cochineal, 18 nankeens, shipped by Henry Pratt, - -	232 0 10	
" 7	To 1 per cent. premium on the foregoing, $1,628 6-10, payable in silver, - -	16 3 07	
			1,644 10 01
" 7	To balance due me this date to your debit in n. account,	-	149 1 06
		-	$8,037 2 10
" 7	By balance carried down, -	-	149 1 06
	Errors excepted. Gibraltar, *Oct*. 7, 1822. Horatio Sprauge.		
" 8	By balance due me this date to your debit in n. account,	-	$1,947 9 02

Errors excepted.

Gibraltar, *October* 8, 1822.

Mr. Charles Pettit in account current with Horatio Sprague.

Dr.

1823.			
Oct. 16.	To balance due me on acct. current furnished present date -	–	$15,730 2 0
30.	Cash paid you - -	$100 0 0	
	Freight on fruit shipped from Malaga - - -	3 1 14	
			103 1 14
Nov. 29.	Cash paid for you - -	–	48 0 0
Dec. 5.	Ditto - -	–	50 0 0
16.	Two-thirds of a quarter cask Marseilles wine - -	12 0 0	
	My drafts (2) of this date on Samuel Williams, London, payable to your order at 90 days' sight, per £100 *a* 200 ex 48 2d. - - -	989 8 5	
	Cash paid you - -	100 0 0	
	My letter of credit on John Henry Rogers & Co., of Marseilles, for amount on account of charges on 3 bales romals, received per Conestoga - - -	6 9 7	
			1,508 5 12
			$17,439 9 12
	To balance brought down -	–	$1,961 3 10

Cr.

1823.			
Dec. 16.	By a transfer of this sum (to your debit, May 30) as our advance on invoice of nankeens and crape dresses, ex ship Conestoga, £852 *a* 48d	$4,260 0	
	By do. as above, Sept. 1, 98 4 1 *a* 49 - -	481 0	
	By do. on nankeens, May 30, 787 10 0 *a* 48 - -	3,937 6	
	By do. on cocoa, 1,360 0 0 -	6,800 0	
			15,478 6 0
	By balancc due me to your debit in n. account - -	–	1,961 3 10
			$17,439 9 10

Errors excepted.

GIBRALTAR, *December* 16, 1823. HORATIO SPRAGUE.

Dr.

Mr. Charles Pettit in account current with Horatio Sprague.

1823.					
May 16	To cash paid you this date	-	$321	0	0
" 20	Do.	-	321	0	0
" 24	Accepted your dft. Phil. 2d ult. fav. J. Leamy, a 10 ds. sight	$450 0 0			
	Do. 4 idem A. Sanchez & Son at 15,409 79	409 9 9	859	9	9
" 27	Cash paid you	-	48	0	0
" 30	Do.	-	48	0	0
" "	Sundry bills on London, endorsed to W. & J. Brown & Co., delivered you this date, p. £3,000, £200, together, £3,200, Ex. 48d.	16,000 0 0			
	Do. as above, £500, £352—£852	4,260 0 0			
	Do. idem £500, £287 10—£787 10	3,937 6 0	24,197	6	0
June 2	Do. Thompson & Powers £480	-	2,400	0	0
" 10	A crape robe,	-	10	0	0
" 19	Cash paid you at Malaga by Bolen & Co.	-	48	0	0
" 23	Cash paid you	-	48	0	0
" 24	Do.	-	16	0	0
" 28	Do. in silver, $100, at 1 1-2 per cent. premium	-	101	6	0
July 1	Do.	-	48	0	0
" 8	Do.	-	192	0	0
" 22	Do.	-	96	0	0
" 24	Paid Middleton & Ashton for olives, per order	9 0 0			
" 29	Do.	39 0 0	48	0	0
Aug. 6	My draft on Sam. Williams, London, 90 days' sight, £204 8 6, at 48 1-2	-	1,011	6	14
" 9	Do. R. D. Tucker, Boston, favor C. N. Banker, at 60 days' sight	-	621	4	0
" 11	Cost of half dozen Westphalia hams	-	12	10	8
" 18	Cash paid you	-	32	0	0
" 27	Do.	-	96	0	0
Sept. 1	Guy Champion's dft. on Champion & Ribbs, London, a 90 d. s. endorsed to Thompson & Powers, £44 10 5 at 49	-	218	0	11
			$30,219	7	10

Mr. Charles Pettit in account current with Horatio Sprague, continued.

CR.

1823.			
May 28	By proceeds sales of 15 chests imperial tea, ex Conestoga per acct. sales rendered -	1,037 5 2	
	Do. do. 17 do. - - -	1,234 1 7	
	Do. 4 bales E. I. ps. goods, idem - - - - -	660 4 2	$2,931 10 11
July 16	Do. 2,240 barrels flour ex do. idem - - - - -	-	13,345 3 11
" 31	Do. 36 hhds. rum ex Adriana idem - - - - -	-	1,082 3 4
Aug. 18	Do. tobacco and rice, idem -	1,849 9 4	
	Do. rice ex Bingham - -	2,479 10 10	
	Do. choppa, romals, and rice, ex Adriana - - -	2,770 1 6	7,099 9 4
Sept. 1	Balance to following page -	-	5,760 4 12
			$30,219 7 10

DR.

1823.			
Sept. 1	To balance brought forward	-	$5,760 4 12
	Guy Champion's draft on Champion & Ribbs, London, a 90 ds. sight, endorsed to W. & J. Brown & Co. per £98 4 1, £577 15 10, together, £675 19 11, a 49	-	3,311 0 0
" 9	Cash paid you - - -	-	100 0 0
" 13	Amount invoice of 37 flasks quicksilver shipped J. C. & W. H. Smith, pr. Saunders for Philadelphia, - -	1,224 6 14	
	Do. 30 flasks to Henry Toland, idem - - -	993 0 12	
	Do. 125 flasks, Thos. Willing	4,137 0 6	6,354 8 0
Oct. 6	Cost of a quarter cask sherry wine received from Gordon & Co. $75, freight $1 1-4 -	-	76 1 4
" 8	Cash paid you - - -	-	48 0 0
" 9	Cost of fruit shipped for you by Bolen & Co. - -	-	80 0 0
			$15,730 2 0
" 10	To balance brought down, -	-	$15,730 2 0

CR.

Oct. 16	By balance due me this date to your debit in n. a. -	-	$15,730 2 0

E. E.—GIBRALTAR, 16*th October*, 1823. HORATIO SPRAGUE.

And the counsel for the said plaintiff did then and there insist before the said court in behalf of the said plaintiff, that the said several matters and things so produced were sufficient in law and justice to entitle the said plaintiff to recover his damages and costs against the said defendant.

But the counsel for the said defendant did then and there insist before the said court that the said several matters and things so produced and given in evidence, were not sufficient in law to enable or entitle the said plaintiff to recover his costs and damages.

And the learned judges before whom the cause was tried did then and there declare and deliver their opinion to the jury aforesaid—

That there being a plea of the statute of limitation, the plaintiff must by his replication bring himself within the exception concerning merchants' accounts in the said statute, or must fail.

That to be within the said exception, such accounts must concern trade and merchandise, and must also contain mutual demands, and must be open and running account, and must be such for which an action of account would lie, and must be between merchant and merchant, their factors or servants, not merely between those who hold their goods under an obligation to account.

That here the plaintiff claimed $1,579, the balance of sales of property, as per account sales June 30, '25, amounting to $2,579.—Cr. by $1,000—bill on Pearson.

That the plaintiff and defendant agree in the amount of sales, and no item is objected to.

That thus far the account is a stated one, not being objected to for ten years; if any balance is due it is ascertained by mutual consent.

That there is no mutual account between them, nor an open one, and there can be no new account opened between them.

That the contest does not depend on an account, but on who has a right to a liquidated balance—admitted by defendant to be in his hands as the proceeds of plaintiff's property: plaintiff claims it as his own: the defendant claims to apply it to a debt due by Pettit.

On the pleadings, the question is, not who has a right to the money, but whether plaintiff is not barred by the statute.

That the plaintiff had not made out a case which exempts him from the statute.

That if Sprague had rendered the account sales to the plaintiff, and admitted the balance to be payable to him, that would not bring plaintiff within the exception.

That the plaintiff had a complete right of action on demand of a settled balance, and that he made this demand in 1825, and the statute would then begin to run.

That the plaintiff's only claim is for a precise balance; and that this would not have been the mutual open account current between merchant and merchant, concerning the trade of merchandise between plaintiff and defendant.

That it did not become so by defendant claiming to retain the balance for Pettit's debt, nor did it change the nature of the transaction, or make the cause more a matter of account than if he admitted the plaintiff's right to it.

That the only question is, who is entitled to the balance of a settled account: admitting then that defendant was the factor of the plaintiff, he has failed in making out his replication as matter of law—

That it was not a case of trust, not embraced by statute.

That taking the account then as one where defendant was factor for plaintiff—bound to account to him and pay him the balance, and having no authority to apply the proceeds to Pettit's debt, and plaintiff not bound by receipt of $1,000, the nature of the transaction does not bring it within the exception, being for a liquidated balance admitted; and by the correspondence between the parties, the controversy brought to a contest for the balance, this can be an exception only on the ground of merchants being privileged characters.

The correspondence between the parties, so long ago as early in the year 1826, shows that the question between them was not about the account or any item in it, but on the right of Mr. Sprague to retain the admitted balance to repay the advances he made to Pettit: that was the only question in dispute between them, and it is the only one now, and has so continued for more than ten years.

This view makes it unnecessary to consider the other interesting questions as to the powers of agents, factors, supercargoes, pledging, and of sub-agents; the jury are to take the direction of the court in the question, which is a matter of law: and so left the same to the jury.

And thereupon the counsel for the said plaintiff did in his behalf except to the aforesaid opinion and charge of the court, and did insist on the several matters and things given in evidence on entitling the said plaintiff to recover his said costs and damages. And the jury aforesaid then and their verdict for the said defendant. And inasmuch as the said several matters and things so produced and given on evidence in the parts of the said plaintiff and of the said defendant do not appear by the record of the verdict aforesaid, the counsel for the said plaintiff did then and there propose their exception aforesaid to the opinion and charge of the said court, and pray the said justices to put their seals to the bill of exceptions containing the several matters so produced and given in evidence, according to the force and effect of the statute in such case made and provided; and thereupon the said judges, at the request of the said counsel for the said plaintiff, did put their seals to this bill of exceptions pursuant to the statute in such case made and provided, at Philadelphia, in the district aforesaid, this twenty-sixth day of November, one thousand eight hundred and thirty-six.

L. S.

JOS. HOPKINSON, L. S.

CHARGE OF COURT.

TOLAND *vs.* SPRAGUE.—*Attached at the request of Judge.*

The record exhibits the plaintiff's cause of action and the issue joined on the pleadings.

He must first consider the issue on the plea of the statute of limitations, which the defendant has set up in bar of the plaintiff's action for if the case comes within the statute, and the plaintiff does not bring himself within the exception, it will become unnecessary to examine the merits of the case. The act is as follows, 1 Smith, 76:

As the cause of action is admitted to have arisen more than six years before the bringing of the suit, the case comes within the words of the enacting clause, and the plaintiff must, by his replication, bring himself within the exception, or he must fail in his action, whatever the merits may be—6 D and E, 192, 3; 9 Pet., 416, 19, and 185. Acts of limitation, though formerly held very strictly against a party pleading them, are now viewed favorably as acts of repose, compelling persons who have claims against others to use diligence in their assertion, and such pleas are not deemed dishonorable. Vide Bell *vs.* Morrison, Pet., Spring *vs.* Gray's executors.

The construction of a contract, the rights and obligation of the parties arising under it, depend on the law of the place where it is made or to be executed; but the remedies on the contract depend on the law of the place where the suit is brought to enforce it, acts of limitation affecting the remedy only, and not the right. We must decide this case by the law of this State, and its construction by the Supreme Court. 8 Pet., 372.

As that court has so decided it, the settled law of the State is, that unsettled accounts between a merchant and his factor are within the exception of the act of limitation, and not barred by it, though seventeen years had elapsed from the time of the transactions on which the accounts arose: 2 Dall., 264; 2 Geates, 105. But there is no decision by which all accounts between merchant and factor are brought within the exception; the extent to which the court have gone is, "that accounts still remaining unliquidated and unsettled between the parties, as merchants, concerning the sales of merchandise," &c., are not barred by the act, which was the case of Stiles *vs.* Donaldson, decided in 1796; the principle of which has remained unquestioned.

In a late case the Supreme Court have defined what is such an account as is or is not within the exception, which is the rule for our decision, and will be laid down in their own words:

"Conceding that this is such an account as concerns the trade of merchandise between merchant and merchant, their factors and servants, is it a mutual account, so as to bring it within the exception of the statute? The principle which governs this case was ruled by Justice Dennison, in Coates *vs.* Harris Bull, N. P. 149. The clause in the statute of limitation about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands against two persons. There were no mutual and reciprocal demands between S. and M. The demand was altogether on one side, for M. had no account whatever against S.; he had, it is true, paid him $20 on account, for which S. had given him credit more than six years before the institution of this suit; but this does not constitute a reciprocal demand within the meaning of the court, in Coates *vs.* Harris; but is a payment in part of M.'s account: 17 S. & R., 347. Ingraham executor of M. *vs.* Sherard.

In adopting these rules, the Supreme Court of this State have followed the decisions of the courts of England, New York, and the Supreme Court of the United States, in the construction of similar acts of limitation, with the same exception of merchants' accounts: 5 J. C., 522; 20 J. R., 582; 6 Pet., 166; whereby there is one settled rule on the subject.

The exception is of unsettled accounts, such as remain unliquidated, or in other words, open running accounts; but what are open accounts has been a matter of much difference of opinion. On one side, it has been said that an account between merchant and merchant is not an open one, if there has been no item of account between them for six years; and that the statute is a bar, let the nature of the account be what it may. On the other hand, while this is admitted to be the rule as to the ordinary accounts of individuals, it is said not to apply to accounts between merchant and merchant, or their factors and servants: in our opinion this distinction is founded in strong reasons, and supported by authority.

As it is a settled principle that mutual accounts between common persons are not within the statute, if there are items on both sides within six years, because such items draw with them the whole account out of the statute, the exception in favor of merchants' accounts would be inoperative, if they were put on the same footing. It is evidently the meaning of the law, that its effect on the excepted accounts should be different from its effect on such as were not within the exception, and that such difference depended not on time alone as to the general account or its items, but the relation of the parties towards each other, and the nature of the accounts growing out of such relation. It would seem to follow, as a necessary conclusion, that the mere cessation of all dealings or accounts between the parties for six years or more, would not take the account out of the exception, if in other respects it came within it; and so we think the law has been settled in 2 Dall., 264, and 5 Cr., 15, 18: to bring the case, however, within the exception, in favor of merchants, certain rules are prescribed.

The action excepted must be an action of account, or for an account; it is not sufficient that it be founded on a contract between a merchant and his factor; the cause of action must arise on an account to be settled and liquidated between them, growing out of their relation to each other, and consequent transactions; not on an ordinary traffic, dealing, or mere buying and selling. The account must be of that peculiar kind which subsists between merchant and merchant, as principal or agent, consignor or consignee, or where there is some confidential connexion between them, other than the mere obligation to pay a debt, or balance of account, or to account for property which has come to the hands of a defendant, without that purity which exists between merchant and factor.

Thus, an account between the charterer and the charteree of a vessel, (to use the language of the Supreme Court) where one merchant had furnished an outward cargo, and the owner of the ship was to receive one-half the profits of the voyage in lieu of freight, and the first had received the return cargo without accounting for it. The case was held not to be within the exception, and the action was barred on a plea of the statute of limitations. 6 Pet., 166, &c.

So, where an insurance company being part owners of goods, had received and held them without accounting to a joint owner, his action was barred, because the relation between the parties was not such as brought the action within the exception, and the accountability arose as mere matter of law, not founded on any confidence between the parties. 5 J. C., 522.

As to the account, it must be an open or a current one, not a stated or settled one, which has been liquidated, and a balance struck; the difference between an account current or an open one, and a stated or settled one, is this: The items of the former are open to objections by either party; it is a mere statement of charges and credits till the parties have examined it, and done some act agreeing to the correctness of the account, or by which the law presumes an assent to it as a stated account. The mere cessation of dealing for six or a greater number of years does not make an account a stated one, nor does the mere rendering an account produce that effect: it is a mere statement of the account by one party, his declaration in in writing of the debt and credit between them, with the result in his view. If the other party receives the account, admits the correctness of the items, claims the balance or offers to pay it, as it may be in his favor or against him, then it becomes a settled account; or, if after receiving the account, the party to whom it is rendered retains it without objecting to it in a reasonable time, the law presumes him to have assented to the statement as correct, and it then becomes a settled account, as much as if signed by both. When an account is open, each party is bound to prove his items of charge; when it has been settled by express consent, or by the consent presumed by law, the items need not be proved; they stand as proved, and the party objecting must show by clear proofs that there are errors which must be specified, otherwise the account remains closed. On this subject we have heretofore stated the law to have been well settled. Vide Baker *vs.* Biddle, Bainbridge *vs.* Wilcocks, York & Sheepshanks *vs.* Wistar; and so it is understood by the usage of merchants. You will thus perceive that a plaintiff whose case falls within the statute, stands on narrow ground when he seeks to take it out by bringing himself within the exception of merchants' accounts. He is barred by the statute, unless he makes out the truth of his replication by showing that the action is founded on an account which is—1. Mutual, containing reciprocal demands, not where the charges are all on one side. 2. Concerning trade of merchandise, other than buying and selling. 3. Between merchant and merchant, their factors and servants, other than those who merely hold their goods or money under an obligation to account. 4. Open or current, the items of which are open to objection, and the account unsettled and unliquidated. 5. Embracing more than a single transaction. 6. Not depending on a contract, but on accounting where the cause of action is founded on an account to be settled, whereby the case grows out of the account, and its justice appears in it. 7. Proper for an action at law, or a bill in equity for an account. 8. Which shows a direct connexion or privity between the parties as merchant and merchant, or merchant and factor or servant, by the nature of the transactions between them. 9. The subject-matter of the account must be different from the ordinary course of dealing and trade between merchant and customer, on which common actions may be brought; for the exception is not a personal privilege attached to the acceptation of a merchant, but an account of the difficulties attending the settlement of complicated commercial transactions, depending on mutual open accounts, requiring time to adjust and liquidate.

In such cases, the law does not compel a suit to be brought in any definite time, but as they are exceptions to a general rule prescribed by a positive law, they must be stated in the pleadings, and made out by proof; we must give effect to an act of limitations as to any other law, according to the intention expressed in its terms, and so construe it as to enforce the general rule where the excepted case does not plainly arise. There is no good reason for excepting a merchant's account for goods sold, a suit on a note or bill of acceptance, or the balance of a settled account; on such causes of action a merchant can sue as well as any other person, his demand is certain; it does not depend on any account to be rendered, but on proof of a sale, or the paper which shows the precise amount due. You will apply these rules of law to the case as it appears in evidence.

The plaintiff's claim is for $1,579; being the balance of sales made by defendant of certain goods belonging to the plaintiff, as per account of sales of 30th June, 1825, amounting to $2,579, with an admitted credit of $1,000 received by a bill on Pearson. The sale of the tobacco had been previously closed. As both parties agree on the amount of sales, and no item in the account is objected to, it is thus far a stated account, by not being objected to for ten years; and if any balance is due, it is ascertained by mutual consent; the account is not a mutual one, there are no charges against the plaintiff, nor are there any items to be adjusted or liquidated; the account was not therefore an open or running one. No new account can now be opened between them; the present contest between them is not on the account; no item in it is in controversy: as the plaintiff does not now object to the price, terms, or expenses on the sale, nothing remains to be settled between them except who has the right to a liquidated balance, admitted by the defendant to be in his hands, as the proceeds of plaintiff's property. The plaintiff claims this balance, because the goods sold being his, he has a right to the proceeds; the defendant claims to hold the balance, apply it to a debt due him by Mr. Pettit, from whom he received the goods; and, on the pleadings, the case does not turn on the question who has the right to the money, but whether the plaintiff is not barred by the act of limitation. We must then inquire whether the plaintiff has brought himself within the exception. Had the account been rendered to the plaintiff, with a stated balance payable to him, to which he agreed, the exception would not apply; a right of action to recover a certain amount was complete on a demand of the settled balance, which would be an admitted case for the operations of the statute after six years. 20 I. R., 585, 6; 1 Tarent., 571.; 2 Tarent., 323. In this case the claim is for a precise balance, which was demanded by the plaintiff from the defendant, in 1825, and is now demanded in this suit brought ten years after; the refusal to pay then was also for the same reasons as now urged, with the addition of the plea of the statute. From the nature of the account, therefore, and the conduct of the parties, there was, from the 30th June, 1825, no unsettled, mutual, open account between them as merchant and merchant, or merchant and factor, no matter of account remained to be settled; there was a matter of controversy brought to a single point between them, which had by law a right to a sum of money ascertained by consent to amount to $1,579. The nature of the account is not changed by there being a controversy as to a balance stated, which the defendant does not now ask to be diminished, or the plaintiff to increase; and as neither party ask to open the account, and both admit the same balance, there can be no pretence for saying it is still open. This is no part of the plaintiff's case, as it has been stated in the opening of the plaintiff's counsel, and admitted through the whole trial; his claim is to recover the balance due him on an account of sales made ten years before suit brought, which account came to the hands of plaintiff shortly after, who immediately demanded the balance. Nothing then remains for inference. After this explicit statement and admission, the question is one of law, which the court must decide as matter of law; there is no parol evidence on this part of the case which can be left to a jury; the account is in writing, the letters of the parties contain the evidence as to the receipt of the account by the plaintiff, the demand of payment of the balance by him, the refusal of the defendant with his reasons. A course of correspondence shows a discussion of the controversy resting on a single point; these letters are admitted to be written by the parties, they contain the written evidence of facts; if they are open to a doubt as to their meaning, their construction is a matter of law; what then can a jury do? The correspondence between the parties so long ago as 1825, shows that the question between them was not about the account or any item in it, but on the right of Mr. Sprague to retain the admitted balance to repay the advances made to Mr. Pettit. That was the only question in dispute then, and it is the only one now, and has so continued for more than ten years. You cannot say that this is not the very point on which your verdict is asked, or that the plaintiff has required his case to be put on any other ground; our duty then becomes a plain one to declare to you that in point of law, even admitting that the defendant was the factor of the plaintiff in 1825, the latter has failed in making out his replication. In doing so we follow the course taken by the circuit court of the first circuit, in Spring vs. Gray's ex., which was affirmed by the Supreme Court, 6 Pet. 162, 3. Failing to support his action as coming within the exception to the statute, the plaintiff cannot recover on the ground of Mr. Sprague being, as a factor, a trustee, and the transaction between them creating a trust, the case is not within the statute as was held by